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In the Supreme Court of the United States

OCTOBER TERM, 1990

CARMEN ANA CULPEPER, ET AL.,
PETITIONERS,

v.

ROBERT SCHNEIDER, ET AL.,
RESPONDENTS.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

Certiorari should be issued in this case because:

A. The erroneous application of the *Rooker-Feldman* doctrine and of claim and issue preclusion by the court below, allows the federal district court to sit in review of a decision rendered by the Supreme Court of the Commonwealth of Puerto Rico, contrary to well settled precedents of this Court.

B. The U.S. Court of Appeal's Decision violates fundamental principles of comity and federalism, diminishing the authority and dignity of the Supreme Court of the Commonwealth of Puerto Rico.

C. In exercising jurisdiction in this case the United States District Court for the District of Puerto Rico usurped powers vested upon this Supreme Court by Congress.

LIST OF PARTIES

The parties to the proceedings below were petitioners, the Secretaries of Justice and of the Treasury of the Commonwealth of Puerto Rico and respondents, Robert Schneider, Hector Ramos, Oreste Ramos, Jorge Romany and Jorge Sous, and the Colegio de Abogados de Puerto Rico. The Colegio de Abogados has filed a separate petition of certiorari before this Court.

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PETITION FOR WRIT OF CERTIORARI

Petitioners, the Secretaries of Justice and of the Treasury of Commonwealth of Puerto Rico, hereby respectfully petition that a writ of certiorari issue to review the judgment and opinion of the United States to the Court of Appeals for the First Circuit, so entered in the above entitled proceeding on October 24, 1990.

OPINIONS BELOW

The opinion of the United States Court of Appeals for the First Circuit of October 24, 1990 is reported at 917 F.2d 620 (1st Cir. 1990). Appendix A. The December 20, 1990 Order,

denying the petition for rehearing and the suggestion for a rehearing *en banc*, is attached as Appendix B.

The Opinion of the United States District Court for the District of Puerto Rico is reported at 682 F.Supp. 674 (D.P.R. 1988). Appendix C.

JURISDICTION OF THIS COURT

The judgment of the court of appeals was entered on October 24, 1990. A petition for rehearing and suggestion that the case be reheard *en banc* was subsequently filed. On December 20, 1990 the petition and suggestion were denied. Upon an application for an extension of time within which to file a petition for writ of certiorari, Mr. Justice Souter, on March 14, 1991, signed an order extending the time to and including April 3, 1991. This petition for a writ of certiorari is being filed pursuant to 28 U.S.C. §1254 (1).

PROVISION OF LAW INVOLVED

This case involves the application of 28 U.S.C. §1258:

> Final judgments or decrees rendered by the Supreme Court of the Commonwealth of Puerto Rico may be reviewed by the Supreme Court by writ of certiorari where the validity of a treaty or statute of the United States is drawn in question or where the validity of a statute of the Commonwealth of Puerto Rico is drawn in question on the ground of its being repugnant to the Constitution, treaties, or laws of the United States, or where any title, right, privilege, or immunity is specially set up or claimed under the Constitution or the treaties or statutes of, or any commission held or authority exercised under, the United States.

STATEMENT OF THE CASE

This petition for writ of certiorari poses an important question for the Commonwealth of Puerto Rico in that the court of

appeals, in erroneously applying the doctrine set forth by this Court in *Rooker* v. *Fidelity Trust Co.*, 263 U.S. 413 (1923) *("Rooker")* and *District Court of Appeals* v. *Feldman*, 460 U.S. 462 (1983) *("Feldman")* as well as that of claim and issue preclusion — as did the district court before — is in effect reviewing a final decision rendered by the Supreme Court of the Commonwealth of Puerto Rico that may only be had by this Court. *See*, 28 U.S.C. §1258. This diminishes the authority of the Commonwealth Supreme Court and openly contradicts well settled precedents of this Court. It is the responsibility of this Court to safeguard state jurisdictional sovereignty against impermissible encroachment by lower federal courts. This Court is not only "supreme" over all other courts but, more importantly, it alone has been granted exclusive jurisdiction to review state judgments as well as those of the Commonwealth of Puerto Rico. Certiorari is clearly warranted to correct the decision below and vindicate the sovereignty of the Supreme Court of the Commonwealth of Puerto Rico and to uphold the congressional mandate contained in 28 U.S.C. §1258.

This dispute concerning Puerto Rico's integrated bar has had a long history, it has been the subject of two opinions by the Commonwealth Supreme Court,[1] three opinions by the Court of Appeals of the First Circuit,[2] and four opinions and orders by the United States District Court for the District of Puerto Rico.[3] It originated on November 27, 1977, when

[1] *See*, *Colegio de Abogados de Puerto Rico* v. *Schneider*, 112 P.R. Dec. 540 (1982) *("Colegio de Abogados I")*; *Colegio de Abogados de Puerto Rico* v. *Schneider*, 117 P.R. Dec. 540 (1986). *("Colegio de Abogados II")*. A copy of an official translation of each of these two opinions is attached as Appendix E and F respectively.

[2] *See*, *In re Justices of Supreme Court of Puerto Rico*, 695 F.2d 17 (1st Cir. 1982); *Romany* v. *Colegio de Abogados*, 742 F.2d 32 (1st Cir. 1984); *Schneider* v. *Colegio de Abogados*, 917 F.2d 620 (1st Cir. 1990).

[3] *See*, *Schneider* v. *Colegio de Abogados de Puerto Rico*, 546 F.Supp. 1251 (D.P.R. 1982); Schneider v. *Colegio de Abogados de Puerto Rico*, 565 F.Supp. 963 (D.P.R. 1983); *Schneider* v. *Colegio de Abogados de Puerto Rico*, 670 F.Supp. 1098 (D.P.R. 1987); *Schneider* v. *Colegio de Abogados de Puerto Rico*, 682 F.Supp. 674 (D.P.R. 1988).

Puerto Rico's bar association known as the Colegio de Abogados de Puerto Rico ("Colegio"), filed an action before the Commonwealth Supreme Court to compel 99 attorneys, including the five respondents herein, to pay their dues. After the appropriate proceedings, all attorneys paid their dues, except Robert E. Schneider and Hector R. Ramos, two of the respondents. They averred that the law compelling membership, as well as that requiring payment of the forensic and notarial stamps, were unconstitutional under both the United States and the Commonwealth Constitutions.[4]

The Supreme Court of the Puerto Rico, in an opinion written by then Chief Justice Trias Monge, comprehensively addressed the issues raised by Schneider's and Ramos' objections, and unanimously rejected them. *Colegio de Abogados de Puerto Rico* v. *Schneider*, 112 P.R. Dec. 540 (1982). *("Colegio de Abogados I").* 12 Official Translations of the Opinions of the Supreme Court of Puerto Rico 676. (Appendix D). Citing *Lathrop* v. *Donahue*, 367 U.S. 820 (1961), the court upheld the constitutionality of compulsory bar membership and publicly compelled financial support through payment of dues and cancellation of stamps. However citing *Abood* v. *Detroit Bd. of Education*, 431 U.S. 209 (1977), the court also held that attorneys had a right "to raise objection to the use of their contributions or of part thereof for ideological activities they do [sic] disapproved." *Colegio de Abogados I*, 12 Official Translation at 692.

The Colegio was ordered to draft a Remedy to protect dissenting members' rights according to a set of guidelines established by the Commonwealth Supreme Court that required compliance with U.S. Supreme Court precedents, such as *Abood*. 12 Official Translation at 693-96. The Puerto Rico court retained jurisdiction to deal with the remedy that had to be drawn.

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[4] On July 12, 1978, Schneider and Ramos purported to reserve their federal claims under *England* v. *Louisiana State Bd. of Medical Examiners*, 375 U.S. 422 (1964). *But see, Fuller Co.* v. *Ramon I. Gil, Inc.*, 782 F.2d 306, 311-12 (1st Cir. 1986).

Soon thereafter, on June 9, 1982, Schneider and Ramos filed a civil rights action in federal district court against the Colegio, and the Commonwealth's Secretaries of Justice and the Treasury, challenging, on federal constitutional grounds, compulsory bar membership and publicly compelled financial support to the Colegio.[5] Three other plaintiffs, Jorge F. Romany, Jorge Souss Shidrewa and Oreste V. Ramos Diaz, herein respondents, also filed substantially similar claims, and all four cases were consolidated.

Meanwhile, the Colegio submitted for approval by the Commonwealth Supreme Court the Remedy the Court had ordered it to draft. Before the Puerto Rico court could express itself about the Remedy's validity, the district court issued a judgment declaring the challenged bar statutes unconstitutional "as applied", and enjoining defendants from enforcing them. *Schneider* v. *Colegio de Abogados de Puerto Rico*, 565 F.Supp. 963 (D.P.R. 1983).

In *Romany* v. *Colegio de Abogados de Puerto Rico*, 742 F.2d 32 (1st Cir. 1984) ("Romany") the First Circuit *vacated the judgment* of the district court, and mandated the lower court to abstain, while retaining jurisdiction. The court held that the Supreme Court of Puerto Rico must be allowed an opportunity to conclude the process initiated, but not completed, in its opinion in *Colegio de Abogados I*, review Colegio's proposed Remedy, and accept, reject or modify it.

The proceedings that ensued before the Commonwealth Supreme Court after the court of appeals' mandated abstention, are set forth in *Colegio de Abogados de Puerto Rico* v. *Schneider*, 117 P.R. Dec. 540 (1986) Official Translation of

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[5] Respondents also sued the Justices of the Commonwealth Supreme Court. The court of appeals dismissed the claims against them "insofar as they involve Puerto Rico's system of compulsory bar membership and compulsory payment of bar dues." *In re Justices*, 695 F.2d at 26. Regarding the stamp litigation, the court of appeals considered them "nominal parties". *Id.* In the latest opinion by the court of appeals it recognizes "that the Justices are now appropriate parties in the dues claim because of their promulgation of the 1986 Rule." *Schneider*, 917 F.2d at 629 n.10.

the Supreme Court of Puerto Rico, slip op. at 4-7 (June 26, 1986) ("Colegio de Abogados II). Appendix F. Several of its aspects deserve emphasis. At a prehearing conference held on January 4, 1985, before the Special Master appointed by the Puerto Rico court to receive evidence, respondents Oreste Ramos, Jorge Romany and Jorge Souss, *refused* to participate further in the proceedings.[6] These continued with the full participation of respondents Schneider and Hector Ramos.

Evidentiary hearings were held on January 15 and 22, February 4, 5 and 6, and March 11, 13, and 25, 1985. Colegio presented extensive testimony and documentary evidence that was never controverted by respondents Schneider and Ramos. They presented in evidence the record of the proceeding in the federal court case. Respondents Schneider and Ramos never made any *England* reservation of federal claims or federal forum. *See*, *England* v. *Louisiana State Board of Medical Examiners*, 375 U.S. 411 (1964).

On June 26, 1986 the Commonwealth Supreme Court, per Chief Justice Pons Nunez, issued the opinion that concluded the process initiated in *Colegio de Abogados I*, and established the Remedy called for in that opinion. *See Colegio de Abogados II*. The Puerto Rico court made extensive findings of fact to complement the findings made in its previous decision, as well as in the district court opinion in *Schneider*, 565 F.Supp. 963.

The Puerto Rico court then fashioned the Remedy providing dissenting bar members with an effective instrument to protect their rights. The court devised the Remedy in light of the Commonwealth Constitution and the standards set forth by the several U.S. Supreme Court precedents the court deemed

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[6] The Commonwealth Supreme Court stated that in the motion filed on their behalf they requested "to be relieved from further participation in the case", *Colegio de Abogados II*, slip. op. at 5. The court below rejects this characterization by stating that "we fail to see how they were parties in the first place"; *Schneider*, 917 F.2d at 15 n.11); forgetting, that it was the court itself who in *Romany* ordered respondents to return to the state forum to litigate their claims.

necessary to follow,[7] as well as the court's inherent power to regulate the legal profession in Puerto Rico. Subsequently, the court rejected Schneider's and Ramos' motion for reconsideration raising objections to the Remedy that reiterated the constitutional arguments they have raised throughout this litigation.

Respondents then sought relief before the district court and reactivated the federal case. The district court reopened the case and held a pretrial conference on June 17, 1987. On June 26, 1987, Colegio moved for dismissal on jurisdictional grounds, the district court erroneously denied the motion. *See*, *Schneider* v. *Colegio de Abogados de Puerto Rico*, 670 F.Supp. 1098 (D.P.R. 1987).

Subsequently, the district court held an evidentiary hearing, received post trial memoranda, and issued its judgment. *Schneider* v. *Colegio de Abogados*, 682 F.Supp. 674 (D.P.R. 1988). The district court held that compelled membership in bar association violated dissenters' nonassociational rights because the Remedy designed and implemented by the Puerto Rico Supreme Court, to safeguard their rights, was inadequate. The district court also invalidated statutes requiring that lawyers affix official stamps, sold by the Colegio, to all court documents. *See*, P.R. Laws Ann. tit. 4 §§785, 1006, 1038 (1980).

On October 24, 1990 the court of appeals affirmed in part, reversed in part, modified the judgment of the district court and remanded the case for further proceedings consistent with the opinion. *Schneider* v. *Colegio de Abogados*, 917 F.2d 620 (1st Cir. 1990). The court below erroneously concluded that in designing the Remedy the Commonwealth Supreme Court "invoked its inherent powers over the bar to go beyond their individual complaints to accomplish much needed bar reform."

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[7] The court based itself on *Machinist* v. *Street*, 357 U.S. 740 (1961); *Lathrop* v. *Donahue*, 367 U.S. 820 (1961); *Railway Clerks* v. *Allen*, 373 U.S. 113 (1963); *Abood* v. *Detroit Bd. of Education*, 431 U.S. 209 (1977); *Ellis* v. *Railway Clerks*, 466 U.S. 1883 (1984); *Chicago Teachers Union* v. *Hudson*, 475 U.S. 292 (1986).

Schneider, 917 F.2d at 629. Thus, the fashioning of the 1986 Remedy was in effect and act of rulemaking rather than an adjudication of a case, therefore, the *Rooker-Feldman* doctrine was inapplicable to this case. There was no jurisdictional barrier to the exercise of federal judicial power by the district court. Additionnally, the court below concluded that since only two of respondets were parties in the state court proceedings, even if jurisdiction was improper as to them, "the case would continue on behalf of the remaining plaintiffs." *Id.*

The court below also rejected petitioners' invocation of the doctrine of claim and issue preclusion by stating that the district court first rejected those claims in 1982 and that decision was not challenged in the subsequent appeal that was filed thus, it may be held foreclosed on a later appeal. *Compare*, *Schneider*, 546 F.Supp. 1251 with *Romany*, 742 F.2d 32. Accordingly, the court below erroneously chose to treat the district court's 1982 ruling on preclusion, as establishing the law of the case. As with the *Rooker* issue, the court erroneously concluded also that since not all respondents were parties in the state court proceedings, the case could proceed as to those parties. Having thus disposed of the issues of jurisdiction and preclusion the court below felt free to roam through the particular provisions of the Remedy devised by the Supreme Court of the Commonwealth of Puerto Rico. The court found the remedy to be deficient and gave "defendants . . . six months . . . to submit a modified version of its rule, or an alternative, to the district court, during which time 100% of dissenters' dues must be held in escrow." *Schneider*, 917 F.2d at 640.

The unwarranted assumption of jurisdiction by the district court, later condoned by the court of appeals, based upon an erroneous application of pertinent case law of this Court, enlarges the jurisdiction of the lower federal courts at the expense of divesting this Court of its exclusive jurisdiction to review state judgments. Moreover, the actions taken by the courts below substantially diminished the authority of the Puerto Rico Supreme Court, causing unnecessary friction between state and federal courts.

REASONS FOR GRANTING THIS PETITION

A. The Erroneous Application Of The *Rooker-Feldman* Doctrine And Of Claim And Issue Preclusion By The Court Below, Permits The Federal District Court To Sit In Review Of A Decision Rendered By The Supreme Court Of The Commonwealth Of Puerto Rico.

1. *The Rooker-Feldman Issue.*

The complaint filed in federal district court, was an attempt to seek review of the judgment rendered in 1982 by Puerto Rico's Supreme Court in *Colegio de Abogados I* as well as the subsequent Remedy promulgated by that court in *Colegio de Abogados II*, when the process initiated in 1977 came to fruition. The district court, as a court of original jurisdiction, has no authority to review the final determinations of a state court in a judicial proceeding. 28 U.S.C. §§ 1257, 1258 provide, as the proper court in which to obtain such review the United States Supreme Court. *See, Feldman*, 460 U.S. at 482 ("[A] United States District Court has no authority to review final judgments of a state court in judicial proceedings. Review of such judgments may be had only in this court."); *Rooker*, 263 U.S. at 416 ("The jurisdiction possessed by the District Court is strictly original."); *Atlantic Coast Line R. Co.* v. *Locomotive Engineers*, 398 U.S. 281, 296 (1970) ("[L]ower federal courts possess no power whatever to sit in direct review of state court decisions."). *See generally*, Chang, *Rediscovering the Rooker Doctrine: Section 1983, Res Judicata and the Federal Courts*, 31 Hastings L.J. 1337, 1355 (1980).

In short, an inferior federal court established by Congress pursuant to Art. III, §1, of the Constitution, may not act as an appellate tribunal for the purpose of overruling or modifying a state court judgment, even though the judgment may rest on an erroneous resolution of constitutional or federal law issues. The exclusive procedure for federal review is that specified in 28 U.S.C. §§ 1257, 1258.

The rationale behind this principle is clear and sound. In this nation there are two "essentially separate legal systems." *Atlantic Coast Line R. Co.*, 398 U.S. at 286. "[T]his dual system could not function if state and federal courts were free to fight each other for control of a particular case. Thus, in order to make the dual system work and 'to prevent needless friction between state and federal courts', (citation omitted), it was necessary to work out lines of demarcation between the two systems." *Id.* In this case, those lines were obliterated by the district court when it assumed jurisdiction, and that blatant mistake was perpetuated by the court of appeals' erroneous interpretation of relevant case law.

Throughout the long history of this case it has been petitioners' unflagging position that the holding in *Rooker* and its progeny stand as a jurisdictional barrier to the exercise of jurisdiction by the district court. In *Feldman*, this Court, in reaffirming the validity of the *Rooker* doctrine, distinguished between general constitutional challenges to state bar rules as promulgated by state courts in nonjudicial proceedings — for which there is jurisdiction in the lower federal courts — and challenges to state-court decisions in particular cases arising out of judicial proceedings — for which there is not. 460 U.S. at 486. *See also*, *Pennzoil Co.* v. *Texaco, Inc.*, 481 U.S. 1 (1987) (Marshall, J., concurring in judgment).

Moreover, this Court in *Feldman* indicated that the *Rooker* bar may also apply where the plaintiff fails to raise his federal claims in state court. Stating: "By failing to raise his claims in state court a plaintiff may forfeit his right to obtain review of the state court decision in any federal court." 460 U.S. at 484, n.16.[8]

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[8] In the above mentioned footnote this Court specifically rejected expressions found in *Dasher* v. *Supreme Court*, 658 F.2d 1045 (5th Cir. 1981) that *Rooker* only applied to issues actually raised in state court. See *District of Columbia* v. *Feldman*, 460 U.S. 462, 482-83, n.16 (1982). The *Feldman* court was therefore able to conclude later that "[i]f the constitutional claims presented to a United States district court are *inextricably intertwined* with the state court's denial in a judicial proceeding of a particular plaintiff's application for admission to the state bar, the district court is in essence being called upon to review the state-court decision." *Id.* (Emphasis added).

In this case, the *Rooker-Feldman* doctrine is strictly applicable because this case meets the doctrine's two prong test, to wit: (1) that the proceedings before the P.R. Supreme Court, both in 1982 and 1986, were judicial in nature, and (2) that the constitutional issues raised in federal district court were raised, or could have been raised, in state court and therefore were decided or could have been decided by the P.R. Supreme Court.

(a) *Judicial nature of the proceedings before P.R. Supreme* Court.

In the leading case *Prentis* v. *Atlantic Coast Line Co.*, 211 U.S. 210, 116 (1908) this Court emphasized that the question of whether a court had acted in a judicial capacity turned on the character of the proceeding and the nature of its outcome, rather than upon the character of the body making the decision. "The nature of the final act determines the nature of the previous inquiry . . . So when the final act is legislative the decision which induces it cannot be judicial. . . ." *Id. See also*, *In re Summers*, 325 U.S. 561, 567 (1944).

In *In re Justices*, 695 F.2d at 21 the court of appeals, faced with the task of defining the role of Puerto Rico Supreme Court in these very proceedings unequivocally stated that the P.R. Court was acting in a *judicial manner* and that the "role of the Justices with respect to these statutes[9] is *adjudicative*." *Id.* Furthermore, the court noted that *whenever* the P.R. Supreme Court acts upon a complaint filed before it based on nonpayment of dues "the Justices act as they would in any other case based upon a Commonwealth statute: *they sit as adjudicators, finding facts and determining law in a neutral and impartial judicial fashion.*" *Id.* (Emphasis added). What the court below concluded in reference to *Colegio de Abogados I* also holds true for *Colegio de Abogados II*. In this opinion the P.R. Supreme Court merely brought to an end the process initiated back in 1977, when the original complaint against Schneider and Ramos for nonpayment of dues was

[9] *See*, P.R. Laws Ann. tit. 4 §§ 771-783 (1980).

filed, by providing for an adequate remedy to safeguard their constitutional rights as mandated by *Colegio de Abogados I*. Since this latter opinion is clearly a judicial process, then the result of that process must also be judicial. *Cf. Prentis*, 211 U.S. at 226.

The district court erroneously concluded that *Colegio de Abogados I* ended the adjudicative aspect of the present controversy "so that the 1986 opinion is pure rulemaking." *Schneider*, 670 F.Supp. at 1103. The district court mistakenly sought support for its "bifurcated theory" on *dicta* from *Zimmerman* v. *Grievance Com. of Jud. Dist.*, 726 F.2d 85 (2d Cir. 1983) *cert. denied* 467 U.S. 1227 (1984). In this case the Court of Appeals for the Second Circuit remarked that a state court could combine in one opinion "an adjudication of a grievance complaint with a promulgation of what amounts to a new rule." *Zimmerman*, 726 F.2d at 86. The court of appeals mistakenly agrees with the district court's rationale. *Schneider*, 917 F.2d at 629. The reliance on such *dicta* must be rejected because it is at variance with this Court's admonition that "[t]he nature of the final act determines the nature of the previous inquiry . . ." *Prentis*, 211 U.S. at 226. In *Zimmerman* itself, the court acknowledged that "[i]t would be inconsistent with the thrust of *Feldman* to resolve ambiguities in a state court opinion in favor of the 'promulgation' of a 'new' rule and thereby encounter a jurisdictional issue in the absence of a clear statement from the state court." 726 F.2d at 87. Any ambiguity with respect to the nature and character of the actions undertaken by the P.R. Supreme Court in *Colegio de Abogados II* should have been resolved in a way that would minimize friction between the two judicial systems rather than in a way that promotes it, as did the court below.

Moreover, the court of appeals and the district court failed to recognize that when the challenges presented to a United States District Court are "inextricably intertwined" with the state court judicial proceedings, as in the case at bar, "the district court is in essence being called upon to review the state

court decision." *Feldman*, 460 U.S. at 483-84 n.16. Although this determination is at times difficult to make, "it is apparent, as a first step, that the federal claim is inextricably intertwined with the state court judgment if the federal claim succeeds only to the extent that the state court wrongly decided the issues before it." *Pennzoil Co.*, 481 U.S. at 25 (Marshall J., concurring in judgment).

Both *Colegio de Abogados*' decisions are part and parcel of the same adjudicative process. In 1982, the Supreme Court of Puerto Rico found that compulsory bar membership was constitutionally valid and that the Colegio enjoys ample freedom of speech. Concomitantly, the P.R. Supreme Court upheld Schneider and Ramos' right to dissent from the ideological pronouncements of the Colegio and therefore to object to the use of their contributions, or of part thereof, for those activities. The court then acknowledged the need to, "formulate the adequate remedy within the circumstances involved to enforce said right." *Colegio de Abogados I*, 12 Official Translation at 692. The nature and scope of the constitutional infringement required the creation of a very particular remedy, a remedy tailored to the constitutional violation incurred. *Cf. Hills* v. *Gautreaux*, 425 U.S. 284, 294 (1976). The creation of such a Remedy reifies Schneider and Ramos constitutional rights, for it will be that Remedy which "constitutes the actualization of the right." Fiss, *The Forms of Justice*, 93 Harv. L. Rev. 1, 52 (1979).

Colegio de Abogados II is but the effectuation of the Remedy propounded by the Puerto Rico court in its 1982 decision. The 1986 decision was rendered following the appointment of a special master and an evidentiary hearing in which Schneider and Ramos actively participated. Briefs were submitted by the parties before the court and Schneider and Ramos even filed a motion for reconsideration once the decision was announced. The Remedy issued grants Schneider and Ramos — *specifically* — the right to request a *refund* for any non-germane expenditures by the Colegio, thus providing relief for past wrongs.

The process just described is akin in nature to the procedures followed by federal courts in what Judge Coffin has called the "new model lawsuits", where the nature of the litigation is such that the remedial stage requires of the trier of fact to assume an activist role in order to achieve the proposed goal. *See*, Coffin, *The Frontier of Remedies: A call for exploration*, 67 Cal. L. Rev. 983 (1979). In this type of litigation, more often than not, the objective sought in the lawsuit is achieved through the issuance of a "structural injunction". Which remedy in turn, "involves a long, continuous relationship between the judge and the institution; it is concerned not with the enforcement of a remedy already given, but *with the giving or shaping of the remedy itself.*" Fiss, *op. cit.* at 27 (emphasis added). Thus the judge's functions in these types of cases "is very close to legislative decision making." Coffin, *op. cit.* at 985. *See generally*, O. Fiss & D. Rendleman, *Injunctions* (2d ed. 1984); Eisenberg & Yeazell, *The Ordinary and Extraordinary in Institutional Litigation*, 93 Harv. L. Rev. 465 (1980). That fact, however, does not detract from the judicial nature of the inquiry.

So understood, it is evident that in issuing its decision in 1986 the Puerto Rico Supreme Court was acting in a judicial role and therefore the first prong of the *Rooker-Feldman* doctrine is met.

(b.) *The federal constitutional issues were decided by the Commonwealth Supreme Court.*

The second prong of *Rooker-Feldman* requires a determination that the federal constitutional issues raised in federal district court by plaintiffs were adjudicated by the state court. We submit that they were so decided.

The language used by the Supreme Court of Puerto Rico in *Colegio de Abogados II* is indicative of the fact that it was construing the rights of the parties in light of, not only of the Constitution of the Commonwealth, *but also*, within the general guidelines set forth by the Supreme Court of the United States.

Colegio de Abogados II, Official Translation slip op. at 17-18. The Supreme Court of Puerto Rico analyzed, and resolved, the issues of respondent's personal rights from the perspective of *both* the state and federal constitution. This dual constitutional analysis evidences that the federal issues were not avoided by the P.R. Supreme Court. Moreover, it also indicates that *at the very least*, the court "felt compelled by what it understood to be federal constitutional considerations to construe 'its own law in the manner it did . . .'." *Delaware* v. *Prouse*, 440 U.S. 648, 653 (1979), *quoting Zacchini* v. *Scripps Howard Broadcasting Co.*, 433 U.S. 562, 568 (1977). *See also*, *Michigan* v. *Long*, 463 U.S. 1032 (1983); *Caldwell* v. *Mississippi*, 427 U.S. 320, 327 (1985).

Therefore, respondents Schneider and Ramos, who fully participated in *Colegio de Abogados II*, and the other respondents who refused to participate, cannot seriously argue that in fashioning the Remedy they questioned, the court did not consider their federal constitutional rights, nor can they deny that their only recourse was to seek review before this Court.

2. *The District Court and the Court of Appeals Erroneously Applied the Doctrine of Claim and Issue Preclusion in this Case.*

The district court and the court of appeals erroneously concluded that *Colegio de Abogados II* did not constitute res judicata because the proceedings therein were rulemaking, not judicial ones, rendering inapplicable 28 U.S.C. §1738. The district court also held that two of the three identities required under the law of Puerto Rico for res judicata to apply, were absent in this case. *See*, *Schneider*, 682 F.Supp. at 1103-06.[10]

This determination misperceives the import of the fact that in spite of the abstention ordered by the court of appeals in *Romany*, in their appearance before the Supreme Court of

[10] This decision was issued in response to Colegio's motion to dismiss on jurisdictional and res judicata grounds.

Puerto Rico, in the judicial proceeding followed to adjudicate the proper remedy they were entitled to, respondents failed to make a reservation of federal rights as required by *England* v. *Louisiana State Board of Medical Examiners*, *supra*.[11] In *England*, this Court created the right to reserve the federal forum as an accommodation between the duty of federal courts to accept jurisdiction of federal cases, and the policy of abstention. *See*, *Migra* v. *Warren City School District Board of Education*, 465 U.S. 75, 83-85 & n.7 (1984); *Allen* v. *McCurry*, 499 U.S. 90, 101 n.17 (1980); *Cuesnogle* v. *Ramos*, 835 F.2d 1486, 1494 (1st Cir. 1987); *accord*, *Fuller Co.* v. *Ramon I. Gil, Inc.*, 782 F.2d 306, 312 (1st Cir. 1986).

To this end, this Court established what it considers a bright and clear line: A litigant shunted by abstention to state court must inform that court what his federal claims are "for the purpose of complying with *Windsor*, and that he intends, should the state courts hold against him on the question of state law, to return to the District Court for disposition of his federal contentions." *England*, 375 U.S. at 421.[12] Moreover, the Court "explicitly" held that if a party freely and without reservation submits his federal claims for decision by the state courts, "he had elected to forego his right to return to the District Court." *Id.*, at 419. *See also*, *N.A.A.C.P.* v. *Button*, 371 U.S. 415, 427-28 (1963).

In this case none of the respondents complied with either *England* or *Windsor*. The record before the Commonwealth Supreme Court is bereft of any evidence that even suggests

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[11] Although the district court failed to make any determination regarding the lack of *England* reservation, *see*, 670 F.Supp. at 1101, n.1, the record before the Puerto Rico court clearly shows a total absence of any attempt at making such reservation after the court of appeals mandated abstention. Moreover, the decision below appears to accept this fact, *see*, 670 F.Supp. at 1104, n.4, but misunderstands its significance.

[12] In *England*, this Court clarified its decision in *Government & Civil Employees Organizing Committee* v. *Windsor*, 353 U.S. 364 (1957), interpreting it as requiring that a litigant "must inform [state] courts what his federal claims are," not that he need litigate them there. *England*, 375 U.S. at 420.

that respondents Schneider or Ramos, either informed the court of their federal claims, or much less made the required reservation of their right to return to federal court. Indeed, these respondents submitted to the court as evidence in their favor, the record of the case before the federal court, and such record was received in evidence and considered by the Puerto Rico court upon making its decision. *Colegio de Abogados II*, Official Translation at 6-7.

As to the other respondents in the instant case, their failure to comply with *England* and *Windsor* is much worse. After the court of appeals' mandated abstention in *Romany*, they simply refused to participate in the judicial proceedings before the Commonwealth Supreme Court. *See Colegio de Abogados II*, Official Translation slip op. at 5. In sum, these other respondents simply waived their rights, and implicitly agreed to have the court determine the proper remedy as to them on the basis of plaintiffs Schneider and Ramos' presentation of the facts and the legal issues.

All respondents, freely and without reservation, submitted their federal claims for decision by the Commonwealth Supreme Court, electing, in fact, to forego their right to return to the district court. *England*, 375 U.S. at 419. *Colegio de Abogados II* precludes their relitigating the issues of fact and the federal claims decided by the court, as well as those they failed to submit. *See*, *Migra*, 465 U.S. at 75; *Allen* v. *McCurry*, 449 U.S. 90 (1980); *Feldman*, 460 U.S. at 484 n.16. *See also*, *Casagrande* v. *Agoritsas*, 748 F.2d 47, 49 (1st Cir. 1984).

The district court rejection of this argument on the basis of the law of the case doctrine is erroneous. The *Schneider 1982 Decision* that purports to be "the law of the case" was vacated by the court of appeals in *Romany*. "The law of the case [doctrine] *does not* apply to a finding that is later vacated." *Dorsey* v. *Continental Cas. Co.*, 730 F.2d 675, 678 (11th Cir. 1982); *Johnson* v. *Board of Education*, 457 U.S. 52 (1982). The findings that are an integral part of the vacated judgment "are like-wise vacated and are thus not subject to the law of the

case doctrine." *Dorsey*, *id.* Moreover, the *Rooker* issue is jurisdictional, and may be raised at any time. *City of Kenosha* v. *Bruno*, 412 U.S. 507 (1973).

In a §1983 action, it is now well "settled that a federal court must give a state-court judgment the same preclusive effect as would be given that judgment under the law of the State in which the judgment was rendered." *Migra*, 465 U.S. at 81; *Allen* v. *McCurry*, 449 U.S. at 97-101, 104-05. *See also*, *Kremer* v. *Chemical Construction Corp.*, 456 U.S. 461, 466 (1982); *University of Tennessee* v. *Elliott*, 478 U.S. 788, (1986). In Puerto Rico, pursuant to the Civil Code, (Appendix D), res judicata generally binds parties from litigating or relitigating any issue that was or could have been litigated in a prior adjudication and prevents claim splitting. *Pagan Hernandez* v. *U.P.R.*, 107 P.R. Dec. 720, 732-33 (1978), 7 Official Translations at 795 (Appendix G); *A & P General Contractors, Inc.* v. *Asociacion Cana, Inc.*, 110 P.R. Dec. 753, 762-67 (1981), 10 Official Translations at 984 (Appendix H); *Capo Sanchez* v. *Secretary of the Treasury*, 92 P.R.R. 817, 819 (1965). *See also*, *Migra*, 465 U.S. at 83-85; *Marrese* v. *American Academy of Orthopedic Surgeons*, 470 U.S. 373, 375 n.1 (1985).

Recognition of the application of that principle to the determination made by the state adjudicator of the issues of fact is particularly significant in the instant case, for here, the district court refused to accept as proven the facts found by the Supreme Court of Puerto Rico in *Colegio de Abogados II. Schneider*, 682 F.Supp. at 678. Yet, this Supreme Court has clearly held that "'a *fact*, *question* or *right* distinctly adjudged in the original action cannot be disputed in a subsequent action, even though the determination was reached upon an erroneous view or by an erroneous application of the law'." *Montana* v. *United States*, 440 U.S. 147, 162 (1979), *quoting with approval from United States* v. *Moser*, 266 U.S. 236, 242 (1924) (emphasis by the Court). Indeed, having federal courts give preclusive effect to the factfinding of even state adminis-

trative tribunals "also serves the value of federalism." *Elliott*, 478 U.S. at 788; *Kremer*, 456 U.S. at 479.

The requirements of res judicata were satisfied in this case. First, as more amply discussed above, *Colegio de Abogados II* was a judicial, not a rule making proceeding, that led to the adjudication of plaintiffs rights against the Colegio and the other respondents. The Remedy was issued as an integral part and continuation of the judicial proceedings that began in 1977, continued in 1982 in *Colegio de Abogados I* and were completed in *Colegio de Abogados II*, after the court of appeals' mandated abstention. As the Commonwealth court itself understood, such proceedings were aimed, in the first place, at providing plaintiffs with a judicial Remedy to protect their First Amendment rights. The Remedy provides relief for the wrongs that plaintiffs may have suffered in the past as a consequence of having to subsidize the Colegio's objectionable activities. *See* § E. of the Remedy, *Colegio de Abogados II*, Official Translation at 23-24. As a subsequent aim, and given the effort invested in the case, the Remedy was extended to other dissenters. Both respondents Schneider and Ramos participated fully in the judicial proceedings in state court, and comported themselves as participants in an adversary adjudicative process.[13]

Second, the "things" and "causes" are quite similar in the two actions. The requirements of perfect identity of "things" has been defined as "the object or matter over which the action is exercised." *Lausell Marxuach* v. *Diaz de Yanez*, 103 P.R. Dec. 533, 535 (1975), 3 Official Translations 742, 745 (Appendix I); *Mercado-Riera* v. *Mercado-Riera*, 100 P.R.R. 939, 948 (1972) ("thing" refers to "subject matter" of action). *See also*, *Futura Development Corp.* v. *Centex Corp.*, 761 F.2d 33, 44 (1st Cir. 1985). The Commonwealth Supreme

[13] The other respondents in this case elected not to participate or in any way collaborate with the court in obtaining a Remedy for themselves, implicitly relying on Schneider and Ramos to present their case. Cf. *Restatement (Second) of Judgments* § 40 (1982).

Court has held that there exists an identity of "things" or "object" whenever the court in the second action is necessarily placed at risk of contradicting the previous decision. *A & P General Contractors, Inc.* v. *Asociacion Cana, Inc.*, 110 P.R. Dec. at 765, 10 Official Translations at 998.

Similarly, in *Lausell Marxuach*, the Puerto Rico Supreme Court defined "cause" as "the principal ground, the origin of the actions or exceptions raised and decided, and it must not be mistaken for the means of proof not for the legal grounds of the claims adduced by the parties." 103 P.R. Dec. 533, 3 Official Translations at 745; *Mercado-Riera*, 100 P.R.R. at 950 ("cause" refers to the "ground, reason or motive for the claim"). The Commonwealth Supreme Court has indicated that to determine the motive or origin of the action the court should focus on the facts and reasons given by the parties as they affect the issues. *A & P General Contractors, Inc.* v. *Asociacion Cana, Inc.*, 110 P.R. Dec. at 765, 10 Official Translations at 998.[14]

The motive for respondents' claim in both actions is the same, the alleged unconstitutionality of being compelled to subsidize activities which they find to be objectionable. The only nucleus of fact out of which this whole controversy arises are the same in both cases, and they were fully considered by the Commonwealth Supreme Court.

In exercising jurisdiction in this case by failing to apply correctly the principles just described, the lower federal courts have sanctioned an unprecedented intrusion into state court proceedings, opening a yawning breach in the wall of statutes and judicial doctrines erected by Congress and this Court as a barrier to such intrusions. The result is an open incentive to state court litigants to carve particular issues out of cases resolved by the Commonwealth Supreme Court and cart them

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[14] See also *Fernandez* v. *Trias Monge*, 586 F.2d 848, n.11 (1st Cir. 1978) ("this Circuit has substituted a formal notion of the same cause of action with the broader inquiry into whether the federal claim arises out of 'the same nucleus of fact' as the state claim".); *Lovely* v. *Laliberte*, 498 F.2d 1261, 1263 (1st Cir.), *cert. denied*, 419 U.S. 1038 (1974).

to federal district court in search of what they perceive to be a more favorable forum. This prospect is sufficient to merit this Court's plenary attention.

B. The U.S. Court Of Appeals' Decision Violates Fundamental Principles Of Comity And Federalism, Diminishing The Authority And Dignity Of The Supreme Court Of The Commonwealth Of Puerto Rico.

The decision below violates fundamental principles of comity and federalism by sanctioning federal intrusion in an area of historic and sensitive local concern. As this Court has said: "Since the founding of the Republic the licensing and regulation of lawyers has been left exclusively to the States and the District of Columbia within their respective jurisdictions." *Leis* v. *Flynt*, 439 U.S. 438, 442 (1979). Federal court interference in such matters is not only inappropriate but also unnecessary. The judges of the Supreme Court of the Commonwealth of Puerto Rico like the judges of the state Supreme Courts, are bound to uphold and apply the Constitution and laws of the United States, just as federal judges are. *See e.g.*, *Pueblo* v. *Dolce*, 105 P.R. Dec. 422, 428-29 (1976). This Court has expressly, and repeatedly rejected "the assumption that state judges will not be faithful to their constitutional responsibilities." *Huffman*, 420 U.S. at 64. *Accord*, *Summer* v. *Mata*, 449 U.S. 539 (1981).

As Justice O'Connor has said: "There is no reason to assume that state court judges cannot and will not provide a 'hospitable forum' in litigating federal constitutional questions." O'Connor, *Trends in the Relationship Between the Federal and State Courts From the Perspective of a State Court Judge*, 22 W. & Mary L. Rev. 801, 813 (1981).

Review in this Court was available. What was not available, in a properly balanced federal system, we respectfully submit, was what the court below authorized: review of the Puerto Rico Supreme Court by a federal district court. This

action entails waste of judicial resources and unnecessary friction between state and federal courts.

We are not conjuring up a hypothetical confrontation between the two court systems engendered by the decision below. It is real and tangible. Lawyers in the Commonwealth of Puerto Rico are bound to follow the decisions of the Puerto Rico Supreme Court in all matters, and particularly, in those appertaining to the licensing and policing of the legal profession. Our Supreme Court has advised the legal profession in Puerto Rico that compulsory bar membership and publicly compelled financial support through payment of dues and cancellation of stamp is constitutional. And likewise, that the scheme designed to safeguard dissenting bar members' rights meets relevant constitutional standards. Therefore, lawyers who wish to practice the legal profession in Puerto Rico must pay the appropriate dues. On the other hand, the federal district court has told those same lawyers that they need not pay those dues, because compelled membership in the bar association is unconstitutional in its present form. Both decisions are irreconcilable. Plenary review by this Court is therefore warranted.

C. In Exercising Jurisdiction In This Case The United States District Court For The District Of Puerto Rico Usurped Powers Vested Upon This Supreme Court By Congress.

The practical effect of the district court's — and later the court of appeals' — erroneous application of the *Rooker-Feldman* doctrine and of claim and issue preclusion, is to recapture for the lower federal court the jurisdiction that Congress, in 1961, transferred from the Court of Appeals of the First Circuit to this Supreme Court. *See*, Pub. L. 87-189 §1, Aug. 30, 1961, 75 Stat. 417. When Congress, in recognition of "the change of status of Puerto Rico from that of a territory to that of an associated Commonwealth under the Act of Compact", amended chapter 81 of title 28 of the United States Code[15] and

[15] 28 U.S.C. §1258.

inserted section 1258 to eliminate the right of appeal from the Supreme Court of Puerto Rico to the Court of Appeals for the First Circuit. S. Rep. No. 735, 87th Cong., 1st Sess., *reprinted in* 1961 *U.S. Code Cong. & Adm. News*, 2448, 2449. This aggrandizement of judicial power comes at the expense of divesting this Court of such appellate jurisdiction. The power to do so rests with Congress.

Consistency with federal judicial process requires that this Court have exclusive jurisdiction to review state court judgments. Otherwise, the principles that currently restrict this Court's power over state court judgments: the highest state court requirement,[16] the time limitation on review, and the limitation of review to the state court record,[17] would be totally undermined.

CONCLUSION

For the foregoing reasons, the decision of the U.S. Court of Appeals should be reversed and the complaints filed by respondents dismissed for lack of jurisdiction.

Respectfully submitted,

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[16] 28 U.S.C. § 1257.

[17] *See, Foster* v. *Illinois*, 332 U.S. 134, 135-36 (1947).

90-1513

No. 90-

FILED

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In the Supreme Court of the United States

OCTOBER TERM, 1990

CARMEN ANA CULPEPER, ET AL.,
PETITIONERS,

v.

ROBERT SCHNEIDER, ET AL.,
RESPONDENTS.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

APPENDIX TO PETITION FOR WRIT OF CERTIORARI

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APPENDIX A

United States Court of Appeals
For the First Circuit

Nos. 88-1937 to 88-1939

Robert E. SCHNEIDER, Jr., et al.,
PLAINTIFFS, APPELLEES,

v.

COLEGIO de ABOGADOS de PUERTO RICO,
DEFENDANT, APPELLANT.

ROBERT E. SCHNEIDER, JR., ET AL.,
PLAINTIFFS, APPELLEES,

v.

COLEGIO de ABOGADOS de PUERTO RICO, et al.,
DEFENDANTS, APPELLEES.

Appeal of Carmen Ana CULPEPER, etc., et al.,
DEFENDANTS.

Robert E. SCHNEIDER, Jr., et al.,
PLAINTIFFS, APPELLANTS,

v.

COLEGIO de ABOGADOS de PUERTO RICO, et al.,
DEFENDANTS, APPELLEES.

HEARD NOV. 2, 1989.
DECIDED OCT. 24, 1990.

Robert E. Schneider, Jr., with whom Hector L. Marquez was on brief, for Robert E. Schneider, Jr., et al.

Anabelle Rodriguez-Rodriguez, Asst. Sol. Gen., with whom Rafael Ortiz-Carrion, Sol. Gen., Jorge E. Perez Diaz, Sol.

Gen., and Norma Cotti-Cruz, Deputy Sol. Gen., were on brief for Carmen Ana Culpeper, etc., et al.

Harry Anduze Montano with whom Carlos V. Garcia Gutierrez, Carlos A. Rodriguez Vidal, Pia Gallegos, Patricio Martinez, and Carlos Ramos, were on brief, for Colegio de Abogados de Puerto Rico.

Before CAMPBELL, Circuit Judge, COFFIN, Senior Circuit Judge, and PIERAS,* District Judge.

COFFIN, Senior Circuit Judge.

This case requires us to add another chapter, still not the final one, to an already lengthy saga concerning the constitutionality of Puerto Rico's system of mandatory bar membership. In the decision on appeal, the United States District Court for the District of Puerto Rico held that compelled membership in the bar association known as the Colegio de Abogados de Puerto Rico ("Colegio") is unconstitutional in its present form. *Schneider* v. *Colegio de Abogados de Puerto Rico*, 682 F.Supp. 674 (D.P.R. 1988). The district court also invalidated statutes requiring that lawyers affix official stamps, sold by the Colegio, to all court documents. We agree that the present system is constitutionally deficient, and therefore in large part affirm the conclusions of the district court. We modify the court's judgment, however, to delay temporarily an injunction prohibiting mandatory dues so that the Colegio may remain integrated while it attempts to correct its constitutional defects.[1] We also limit the court's holding on the stamp statutes.

I. *Legal and Factual Background*

We detailed the origins and early history of this case at length when the dispute last came before us. *See Romany* v. *Colegio de Abogados de Puerto Rico*, 742 F.2d 32 (1st Cir.

*Of the District of Puerto Rico, sitting by designation.

[1] An "integrated" bar is an association of attorneys in which membership and dues are required as a condition of practicing law in the jurisdiction.

1984). The district court in its most recent decision also set forth a thorough review of the prior proceedings. *See Colegio*, 682 F.Supp. at 675-679. We see no need to repeat, once again, the full factual and procedural background of this case. This opinion therefore shall contain only that history necessary for a full understanding of the issues we decide today.

Accordingly, we begin this background section by stating briefly the constitutional claim raised by plaintiffs and reviewing the federal law relevant to that claim. The next subsection describes the Colegio system as it presently exists. We then review the district court's decision. In Section II of the opinion, we briefly discuss jurisdiction and appealability issues. Section III contains our analysis and conclusions. The remaining sections discuss the stamp issue and damages, and provide a brief summary of the opinion.

A. Constitutional Principles

Plaintiffs, five attorneys, claim that Puerto Rico's mandatory system of bar membership violates their First Amendment freedom of association by depriving them of the right *not* to associate with the Colegio, which conducts activities they find objectionable.[2] Their primary complaint is that the Colegio uses their compulsory dues and fees to publicly espouse views and support causes, with which they disagree, on controversial issues far removed from the immediate concerns of lawyers. These issues have in the past included supporting the Sandinista Front for National Liberation in Nicaragua, forcing the United States Navy to leave the island of Vieques, stopping the

[2] Plaintiffs brought this action against the Colegio and the Commonwealth Secretaries of the Treasury and of Justice, and the Justices of the Puerto Rico Supreme Court, based on the alleged unconstitutionality of statutes compelling bar membership and payment of dues and stamp fees. *See* P.R.Laws Ann. tit. 4, §§ 771-785, 1006, 1038. The Justices remain in the case as nominal parties only in respect to the stamp claims. *See In re Justices of the Supreme Court of Puerto Rico*, 695 F.2d 17, 20-27 (1st Cir. 1982). Thus, the defendants appealing at this time are only the Colegio and the Secretaries.

draft, and amending the electoral law in Puerto Rico. *See Schneider* v. *Colegio de Abogados de Puerto Rico*, 565 F.Supp. 963, 966-971 (D.P.R. 1983); 682 F.Supp. at 679-681.

In a decision reached after oral argument in this case, and for which we held up our opinion, the United States Supreme Court addressed a virtually identical claim made by 21 members of the California bar. In *Keller* v. *State Bar of California*, ___ U.S. ___, 110 S.Ct. 2228, 110 L.Ed.2d 1 (1990), the Court reaffirmed its earlier conclusion that compelled membership in a state bar association, and the exaction of compulsory dues, do not per se violate an individual's First Amendment rights, *see Lathrop* v. *Donahue*, 367 U.S. 820, 81 S.Ct. 1826, 6 L.Ed.2d 1191 (1961).[3] The court went on, however, to establish for the first time that the principles it previously had developed for the permissible use of compulsory union dues are equally applicable for the use of mandatory bar dues.

> *Abood* [v. *Detroit Board of Education*, 431 U.S. 209 [97 S.Ct. 1782, 52 L.Ed.2d 261] (1977)] held that a union could not expend a dissenting individual's dues for ideological activities not "germane" to the purpose for which compelled association was justified: collective bargaining. Here the compelled association and integrated bar is justified by the State's interest in regulating the legal profession and improving the quality of legal services. The State Bar may therefore constitutionally fund activities germane to those goals out of the mandatory dues of all members. It may not, however, in such manner fund activities of an ideological nature which fall outside of those areas of activity.

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[3] Like the California and Michigan bar associations at issue in *Keller* and *Lathrop*, the Colegio is an organization established by statute to regulate the legal profession and perform other functions associated with improving the administration of justice. *See* P.R.Laws Ann., tit. 4, §§ 771-773. We therefore start from the proposition that the Commonwealth constitutionally may condition the right to practice law upon membership in the Colegio. *See Keller*, 110 S.Ct. at 2232-33 (quoting *Lathrop*).

110 S.Ct. at 2236.

The Supreme Court recognized that its limitation on the use of mandatory bar dues was not self-executing and that a difficult problem remained in defining the class of activities germane to "regulating the legal profession and improving the quality of legal services." *Id.* The Court again found the union context helpful in setting guiding principles, and quoted from its decision in *Ellis* v. *Railway Clerks*, 466 U.S. 435, 448, 104 S.Ct. 1883, 1892, 80 L.Ed.2d 428 (1984):

> "[W]hen employees such as petitioners object to being burdened with particular union expenditures, the test must be whether the challenged expenditures are necessarily or reasonably incurred for the purpose of performing the duties of an exclusive representative of the employees in dealing with the employer on labor-management issues. Under this standard, objecting employees may be compelled to pay their fair share of not only the direct costs of negotiating and administering a collective-bargaining contract and of settling grievances and disputes, but also the expenses of activities or undertakings normally or reasonably employed to implement or effectuate the duties of the union as exclusive representative of the employees in the bargaining unit."
>
> We think these principles are useful guidelines for determining permissible expenditures in the present context as well. Thus, the guiding standard must be whether the challenged expenditures are necessarily or reasonably incurred for the purpose of regulating the legal profession or 'improving the quality of the legal service available to the people of the State.' *Lathrop*, 367 U.S., at 843 [81 S.Ct. at 1838] (plurality opinion).

110 S.Ct. at 2236. Even with this standard, however, the Court acknowledged that the line will be difficult to draw

> between those State Bar activities in which the officials and members of the Bar are acting essentially as professional advisors to those ultimately charged with the regulation of the legal profession, on the one hand, and those activities having political or ideological coloration which are not reasonably related to the advancement of such goals. . . . But the extreme ends of the spectrum are clear: Compulsory dues may not be expended to endorse or advance a gun control or nuclear weapons freeze initiative; at the other end of the spectrum petitioners have no valid constitutional objection to their compulsory dues being spent for activities connected with disciplining members of the bar or proposing ethical codes for the profession.

Id. at 2237.

The Court in *Keller* also acknowledged that state bar associations may encounter added inconvenience or burden in ensuring that compulsory dues are used only for permissible purposes, but observed that "'such additional burden or inconvenience is hardly sufficient to justify contravention of the constitutional mandate,'" 110 S.Ct. at 2237 (quoting *Keller* v. *State Bar*, 47 Cal.3d 1152, 1192, 255 Cal.Rptr. 542, 568, 767 P.2d 1020, 1046 (1989) (Kaufman, J., concurring and dissenting)).

The Court therefore held that a permissible system of mandatory bar membership must include a mechanism for protecting the rights of dissenting members to withhold financial support of activities that fall outside the bar's core purposes.[4] On the limited record before it, the Court declined to speculate on the various methods a bar association might adopt to accomplish the required segregation of funds. The justices noted, however, that the procedure they deemed adequate for unions in *Teachers* v. *Hudson*, 475 U.S. 292, 106 S.Ct. 1066, 89 L.

[4] We shall use the phrases "core purposes" or "core functions" throughout this opinion to refer to the bar's responsibility for regulating the legal profession and improving the quality of the legal service available to the people of the Commonwealth.

Ed.2d 232 (1986), also would suffice in the bar setting. 110 S.Ct. at 2237. In *Hudson*, the Court held that "the constitutional requirements for the collection of . . . fees include an adequate explanation of the basis for the fee, a reasonably prompt opportunity to challenge the amount of the fee before an impartial decisionmaker, and an escrow for the amounts reasonably in dispute while such challenges are pending." 475 U.S. at 310, 106 S.Ct. at 1078.

Before turning to our analysis of whether the Colegio system, which is modeled after the *Hudson* procedure, fulfills these constitutional requirements, we complete our background summary by describing that system and why the district court found that it is inadequate to protect its members' First Amendment rights.

B. The Colegio System[5]

In 1982, in the course of state proceedings involving some of the attorneys who are plaintiffs in this federal case, the Supreme Court of Puerto Rico upheld under state law compulsory membership in the Colegio and compulsory financial support of the bar. *See Colegio de Abogados* v. *Schneider*, 112 D.P.R. 540, 12 Official Translations of the Opinions of the Supreme Court of Puerto Rico 676 (1982). Consistent with federal law, however, the court held that lawyers who dissented from ideological activities not related to the Colegio's purposes must have the right to prevent the use of their funds for those activities. The court ordered that a remedy be designed to protect the dissenters' right to object and, in a 1986 ruling, it adopted the rebate and escrow procedure that is challenged in this case ("the 1986 Rule"). *Schneider* v. *Colegio de Abogados*, 117 D.P.R. 504 (1986), Official Translation of the Supreme Court of Puerto Rico, slip op. (June 26, 1986) (hereinafter *Schneider*, Official Translation).

[5] In this section, and throughout Section I, we will focus entirely on the collection of mandatory dues. We will discuss the stamp issue separately below. *See* Section IV *infra*.

The elements of the Supreme Court procedure are as follows:

1. An interest-bearing escrow account must be set up, into which 15 percent of dissenting attorneys' dues will be deposited.

2. Dissenting attorneys may, at the time they pay their dues, file a general objection to the use of their dues for ideological activities unrelated to the core purposes of the Colegio, and eventually receive a refund of the proportion of their dues based on the cost of all activities found to be "objectionable," or

3. Attorneys may object on a case-by-case basis throughout the year, receiving a proportionate refund based on the cost of the specific activities to which they objected.

4. A three-member panel, composed of retired members of the Puerto Rico judiciary, will determine which activities are truly "objectionable" and whether the 15 percent escrow figure should be modified at some later date. This Review Board has promulgated regulations governing the objection procedure. *See* App. II at 323-344.

5. Dissenting members may not object to the use of their funds for activities related to any of 15 listed "functions and purposes" of the Colegio. *Schneider*, Official Translation, slip op. at 17-18.

C. The District Court Opinion

1. *Defects.* The district court found two significant defects in the Supreme Court's remedy. First, it held that the 1986 Rule fails to limit adequately the types of activities that may be funded with compulsory fees. Second, the method used to accommodate dissenting members, including the 15% escrow, falls short of the procedures required by the Supreme Court for protecting dissenters' rights. We now describe its findings with regard to each of these in some detail.

a. *Activities Suitable for Compulsory Funding.* The 1986 Rule provides for mandatory support for all "[a]ctivities com-

prised within the Bar Association's purposes and ends which are germane thereto." *Schneider*, Official Translation, slip op. at 17. In other words, if an activity promotes a purpose of the Colegio, dissenters may be compelled to subsidize it. The problem, in the district court's view, is that the Puerto Rico Supreme Court has defined too broadly the "purposes and ends" that justify mandatory financial support. The court in particular rejected two purposes articulated by the Puerto Rico court in support of the integrated bar: "'the creation of a strongly pluralistic society,'" *Schneider*, Official Translation, slip op. at 13 (quoting *Schneider*, 112 D.P.R. at 549) and "contribut[ing] to the betterment of the administration of justice," *id.* at 18.

The district court's concern was that almost *any* activity could be said to advance one or both of these interests, and that dissenting lawyers therefore would be compelled to accept the Colegio's publicly expressed viewpoint as representing them on a vast number of sensitive issues. "Accepting these standards as the guides to determine permissible bar activity," the court stated, "would be tantamount to a complete abdication of the court's duty to protect dissenting attorneys' First Amendment rights." 682 F.Supp. at 683.

The district court therefore articulated its own list of "permissible purposes" for which financial support may be compelled. These purposes, which the court acknowledged may not be exhaustive, all revolve around the role of the lawyer as lawyer, rather than relying on the lawyer's more generic role as an informed and perhaps influential member of a complex society. The four areas are: monitoring attorney discipline, ensuring attorney competence, increasing the availability of legal services and improving court operations. Activities that promote one or more of these purposes, and which therefore may be funded by mandatory dues and fees, could include continuing legal education programs, legal aid services, public education on substantive areas of the law (e.g., landlord-tenant) that would help citizens recognize and enforce their legal

rights, and public commentary on such matters as rules of evidence and attorney advertising.[6]

b. *Procedures.* The district court found procedural problems with the 15% escrow amount and with the manner of filing objections.

The escrow system is inadequate, the district court held, because the 1986 Rule fails to require a detailed accounting showing how the Colegio spends its funds, and how it calculated the 15% setaside. The court relied on *Hudson* in holding that the Colegio each year must precisely calculate the escrow percentage based on its projected budget and its estimate of expenditures to be made for objectionable purposes. 682 F.Supp. at 687-88. It held that the Colegio not only must explain the basis for the escrow amount, but also must justify the entire amount to be collected. The court further held that the Colegio must include a "buffer" in the escrow percentage to ensure that, if the impermissible expenditures exceed the amounts budgeted for them, the funds required to be returned to dissenting members do not exceed the escrowed amount.

The other procedural problem noted by the district court is the requirement that dissenters file objections to specific activities in order to receive a refund.[7] The court held that, under

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[6] In fact, the district court identified a fifth category of permissible expenditures — those without expressive content that benefit all members equally. 682 F.Supp. at 685. The Colegio, for example, provides life insurance for its members. Because these kinds of items do not infringe on members' First Amendment rights in any significant way, if at all, the court felt that they need not be strictly scrutinized. *Id., citing Ellis* v. *Railway Clerks*, 466 U.S. 435, 456, 104 S.Ct. 1883, 1896, 80 L.Ed.2d 428 (1984).

[7] Although the remedy provides for a "general objection" to be filed at the beginning of the dues year, or at any time thereafter, the district court viewed the filing of a general objection merely as a "notice of the right to object," with no refund being made until the Review Board adjudicates specific objections. *See Schneider*, Official Translation, slip op. at 22 (§ C(3)(e)) and Regulations at Articles 11 and 13, App. II at 337, 340.

At oral argument, defendants claimed that once any type of objection is made — general or specific — the independent review panel must review all Colegio activities and expenditures in order to determine which were objectionable. Those making general objections would receive a full refund for all

Abood, a dissenter may not be required to object specifically to an activity because this "'would confront an individual . . . with the dilemma of relinquishing either his right to withhold his support of ideological causes to which he objects or his freedom to maintain his own beliefs without public disclosure.'" 682 F.Supp. at 689 (quoting *Abood*, 431 U.S. at 241, 97 S.Ct. at 1802).

2. *State of the Record.* The district court unquestionably was bothered by the state of the record before it. Despite repeated invitations, defendants failed to present evidence concerning the extent of the Colegio's non-ideological activities. Instead, they urged the court to take judicial notice of the lengthy list of law-related activities conducted by the Colegio that was contained in the 1986 opinion of the Supreme Court of Puerto Rico. *See Schneider*, 682 F.Supp. at 692-94 (Appendix A). *See also Schneider*, Official Translation, slip op. at 25-43 (Appendix listing activities).[8] That court had found that the Colegio's ideological activities were de minimis. *Id.* at 13.

In contrast to the lack of evidence regarding non-ideological activities, the district court received substantial evidence of the partisan political activities undertaken by the Colegio. *See* 682 F.Supp. at 679-681. No party, however, provided the court with quantitative or comparative data showing what percentage of Colegio activities typically are devoted to each category. Accordingly, the court felt obliged to conclude "that the ideological activities of the Colegio constitute a large and

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objectionable activities, whether or not there had been a specific objection.

We note, however, that neither the 1986 Rule nor the regulations adopted to implement it include a provision for refunds in the absence of specific objections. Thus, on their face, the Rule and regulations seem to operate as the district court described.

[8] At oral argument, the attorney for defendant Colegio stated that numerous documents, many of which had been generated for the state court proceeding that led to creation of the 1986 Rule, had been offered to the district court but were never admitted into evidence. We obviously do not know the nature of the information contained in those materials, and we have no basis for questioning the district court's apparent conclusion that the offered documents would not have resolved its questions concerning the Rule.

inseparable proportion of the Colegio's total activities." 682 F.Supp. at 681.[9]

Despite the problems it found, the district court stated its belief that the Colegio could devise a lawful procedure incorporating most of the features of the 1986 Rule. 682 F.Supp. at 691. In the absence of appropriate modifications, however, the court held that the Colegio either must cease *all* ideological activities not germane to its core purposes or it may not compel membership. So long as the status quo remained, defendants were enjoined from taking any action against any lawyer for failing to pay fees to the Colegio.

II. *Jurisdiction and Appealability*

Before delving into our own discussion of the Colegio mandatory membership system, we briefly address the parties' various contentions that the case is not properly before us. The defendants claim that principles of federalism, res judicata and collateral estoppel bar our review. Plaintiffs argue that defendants failed to perfect their appeals because of untimely and incorrect filings. We reject all of these claims.

[1] *Jurisdiction and preclusion.* It is well-established that lower federal courts have no jurisdiction to hear appeals from state court decisions, even if the state judgment is challenged as unconstitutional. Review of state decisions may be obtained only in the United States Supreme Court. *See D.C. Court of*

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[9] The district court observed that the apparent factual inconsistency between its findings of "pervasive and continuous" ideological activities by the Colegio, 682 F.Supp. at 678; 565 F.Supp. as 965, and the Commonwealth court's finding that such activities were de minimis was attributable, "at least in part, to a different conception of what are ideological activities." 682 F.Supp. at 678 n.3.

The court also suggested that the Commonwealth Supreme Court's findings were inconsistent with the Colegio's stipulation "that activities similar in nature to those undertaken by the Colegio prior to 1983 [and listed by the district court in its 1983 opinion, 565 F.Supp. at 966-71] have continued," 682 F.Supp. at 678 & n.3. We note, however, that the Colegio's stipulation acknowledged only that certain types of activities have continued, and not that those activities constituted a substantial portion of all Colegio pursuits.

Appeals v. *Feldman*, 460 U.S. 462, 476, 103 S.Ct. 1303, 1311, 75 L.Ed.2d 206 (1983); *Rooker* v. *Fidelity Trust Co.*, 263 U.S. 413, 416, 44 S.Ct. 149, 150, 68 L.Ed. 362 (1923). *See also* 28 U.S.C. § 1257. In *Feldman*, the Supreme Court considered the so-called *Rooker* doctrine specifically in the context of attorney challenges to rules and regulations governing the bar, in that instance relating to bar admission. The Court carefully distinguished between "general challenges to state bar rules, promulgated by state courts in nonjudicial proceedings" — for which there *is* jurisdiction in the lower federal courts — and "challenges to state-court decisions in particular cases arising out of judicial proceedings," 460 U.S. at 486, 103 S.Ct. at 1317 — for which there is not.

Defendants claim that the *Rooker* doctrine is triggered in this case because plaintiffs are, in effect, attempting to appeal the Puerto Rico Supreme Court's decisions in the *Schneider* case. According to defendants, the 1986 Rule was the particular judicial remedy ordered in the original Commonwealth *Schneider* case, and the district court therefore had no jurisdiction to consider its validity.

We disagree, primarily for the reasons identified by the district court. 670 F.Supp. 1098, 1100-1103. The fate of attorneys Schneider and Ramos — the particular judicial decision made in the Commonwealth court — is not at issue here. Plaintiffs challenge not the outcome of that specific case, but the general Colegio system of mandatory bar membership, as defined by various statutory provisions and the 1986 Rule. Although the motivation for the 1986 Rule originated with the Schneider-Ramos case, we are persuaded that the Supreme Court invoked its inherent powers over the bar to go beyond their individual complaints to accomplish needed bar reform. *See Romany*, 742 F.2d at 34 n.3, 40 & 42 (Puerto Rico Supreme Court has "unique latitude" to regulate the bar). That the court chose to combine its rule-making with its adjudication in the form of a single opinion does not detract from the nonjudicial nature of the Rule. *See Feldman*, 460 U.S. at 482, 103

S.Ct. at 1314 ("'[T]he form of the proceeding is not significant. It is the nature and effect which is controlling.'") (quoting *In re Summers*, 325 U.S. 561, 567, 65 S.Ct. 1307, 1311, 89 L.Ed. 1795 (1945)). *See also Zimmerman* v. *Grievance Com. of Fifth Jud. Dist.*, 726 F.2d 85, 86 (2d Cir. 1984) (referring to the possibility of a combined adjudication and rulemaking in single opinion); *Razatos* v. *Colorado Supreme Court*, 746 F.2d 1429, 1433 (10th Cir. 1984) (finding jurisdiction after noting that "[t]he distinction is often difficult to draw" between "general challenges to state bar rules as promulgated and challenges to state court decisions in particular cases.")

Moreover, a contrary conclusion on the nature of the 1986 Rule would have little impact on this litigation because only two of the plaintiffs were parties in the state court; thus, even if jurisdiction were improper as to them, the case would continue on behalf of the remaining plaintiffs. *See In re Justices of the Supreme Court of Puerto Rico*, 695 F.2d 17, 26 (1st Cir. 1982).[10]

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[10] Defendant Colegio claims that, if the 1986 Rule was the product of a regulatory rather than an adjudicative process, then plaintiffs should have amended their complaint to seek review of an administrative act and the district court should have reviewed the rule under the substantial evidence test that is used for agency decisionmaking. This argument is without merit. The district court had no jurisdiction to conduct an administrative review of the 1986 Rule. It considered the Rule's content as part of plaintiff's claim that the Colegio mandatory membership system violates the First Amendment. The question before the district court was not whether there was substantial evidence to support the Rule, but whether the Rule modifies the compulsory Colegio system specified by statute so that that system meets constitutional requirements.

The Colegio also argues that the Supreme Court Justices should have been brought in as parties if the validity of a "rule" were at stake. Although the Justices originally were full defendants and remained as nominal parties with respect to the stamp claims, we ordered dismissal of the claims against the Justices in 1982 "insofar as they involve Puerto Rico's system of compulsory bar membership and compulsory payment of bar dues." *See In re Justices*, 695 F.2d at 20-25, 27. At that time, the compulsory membership and dues claims involved only the statutes creating and regulating the Colegio. The Colegio is correct that the Justices are now appropriate parties in the dues

[2] As for defendants' invocation of res judicata and collateral estoppel as bars to this action, we note that the district court first rejected these claims in 1982, and that that decision was not challenged in the subsequent appeal to this court. *See Romany*, 742 F.2d at 37 n.6. Nothing that has occurred either in the Puerto Rico Supreme Court or the district court since that time convinces us that we should now open up that issue for full review. Moreover, unlike jurisdiction, preclusion is a matter subject to some flexibility in application. *See Berrios Rivers* v. *British Ropes, Ltd.*, 575 F.2d 966, 970 (1st Cir. 1978) (Puerto Rico courts have recognized that "in certain cases, the policies of *res judicata* are not well served by literal application of the procedural rules of the courts.") Accordingly, without further analysis, we choose to treat the district court's 1982 ruling on preclusion as establishing the law of the case. *See* 18 C. Wright, A. Miller & E. Cooper, *Federal Practice and Procedure* § 4478, at 801 (1981) (if a "matter is omitted from one appeal . . . it may be held foreclosed on a later appeal to the same court as a matter of law of the case").[11]

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claim because of their promulgation of the 1986 Rule. *Id.* at 23. We fail to see, however, how this fact affects the validity of either the district court's judgment or our own. The Colegio and Secretaries have defended the 1986 Rule on the merits, and the Colegio presumably has the ability to ensure that the Rule is refined in the ways required by our opinions. If not, plaintiffs' rights will be effectively protected by the district court's injunction against the Colegio and the Secretaries.

[11] As with the *Rooker* doctrine, res judicata and collateral estoppel would not, in any event, apply to plaintiffs Romany, Souss and Oreste Ramos Diaz because they were not parties on the merits in the Commonwealth litigation. Although defendants attempt to characterize them as having *withdrawn* from the Commonwealth case, and the Supreme Court in its 1986 ruling refers to a motion on their behalf "to be relieved from further participation in the case," *Schneider*, Official Translation, slip op. at 5, we fail to see how they were parties in the first place.

In addition, the rulemaking aspects of the Puerto Rico case, including the Supreme Court's factfinding on the nature and extent of the Colegio's "objectionable" activities, do not implicate preclusion principles because they were not "judicial proceedings" entitled to full faith and credit. *See* 28 U.S.C. § 1738.

Thus, the potential scope of preclusion in this case is quite narrow, and even had defendants preserved and prevailed with this defense against plain-

[3] *Appealability.* Plaintiffs contend that both the Colegio and the Secretaries filed untimely appeals from the wrong judgments. Appeals must be filed "within 30 days of the judgment or order appealed from," Fed.R.App.P. 4(a)(1), and courts of appeals have jurisdiction only over "[f]inal decisions," 28 U.S.C. § 1291. Before addressing the merits of plaintiffs' argument, we review the procedural chronology.

The district court issued a full opinion on the merits on March 3, 1988, but delayed entering final judgment until after the defendants had an opportunity to modify the remedy to bring it into compliance with the court's guidelines. The defendants made no changes, and the court issued an opinion on May 27 entering judgment in accordance with the March 3 decision. That May 27 decision was formally entered on the docket on either May 31 or June 1. On June 13, the Colegio filed a motion requesting additional findings of fact, which was denied by the district court on July 15. Both the Colegio and Secretaries filed their appeals on August 10.

The Colegio appealed from the court's March 3 order and from the July 15 denial of its motion for additional findings of fact. The Secretaries' notice of appeal sought review of a June 17 judgment.

It is worth noting at the outset of our discussion that if form alone were to govern, we would have to dismiss both appeals of the merits. The Secretaries appealed from a nonexistent judgment on June 17, while the Colegio appealed from a nonfinal judgment — the one on March 3. It would disserve the interests of justice, however, if we dismissed the appeals on these grounds. Indeed, the Secretaries apparently made no more than a clerical mistake in referring to a June 17 judgment, which should not bar appellate review. *See Foman* v. *Davis*, 371 U.S. 178, 181, 83 S.Ct. 227, 229, 9 L.Ed.2d 222 (1962). The Colegio, while committing more than clerical error, undoubtedly appealed from the March 3 decision be-

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tiffs Schneider and Ramos, our opinion would have differed only with respect to their individual entitlements to damages.

cause it contained the district court's full analysis. With regard to both appellants, there is no doubt as to the nature of their appeals, and avoiding decision on the merits would be contrary to the spirit of the Federal Rules of Civil Procedure. *Id.*

As for timing, we accept the district court's conclusion that the Colegio's motion for additional findings of fact was timely,[12] extending the time for filing an appeal of the court's judgment until 30 days following the court's decision on that motion. *See* Fed.R.App.P. 4(a)(4) (timely motion by *any* party extends time for appeal). Both the Colegio and the Secretaries met that extended deadline.

III. *Discussion*

We begin by stating that, in most significant respects, we agree with the district court's legal conclusions and its disposition of this case. We nevertheless write at some length so that we may respond to arguments made by both plaintiffs and defendants,[13] and so that, in some instances, we may elaborate on the district court's discussion in ways that we hope will prove helpful to defendants in administering a constitutional procedure for protecting dissenters' rights.

Our review of the Colegio system requires us to answer three primary questions: what activities may be funded with compulsory dues? does the 1986 Rule adequately protect the right of dissenters *not* to contribute to other activities? and

[12] Plaintiffs argue at length about whether the official entry of judgment for the May 27 decision occurred on May 31 or June 1. Regardless of the correct date, we would not reject as untimely an appeal that is dependent on the later date because of the legitimate confusion over which date the judgment was entered.

[13] Both plaintiffs and defendants filed appeals in this case. Defendants claim that the district court erred in concluding that the 1986 Rule fails to meet constitutional requirements. Plaintiffs claim that the court erred in finding that they do not have standing to challenge the government's involvement in collecting Colegio stamp fees, in awarding them only nominal damages and in approving certain aspects of the 1986 Rule.

what steps must defendants take to fulfill their constitutional obligations to dissenters?[14] We address each of them in turn.

A. What activities may be funded with compulsory dues?

The district court's view that an integrated bar may use compulsory dues only for activities directly related to the lawyering profession and the operation of the judicial system accords with the Supreme Court's subsequent pronouncements in *Keller*. *See supra* p. 624. To be sure, Puerto Rico's legislature and Supreme Court evidently envision purposes for the Colegio extending far beyond a "professional advisor" role. *See Keller*, 110 S.Ct. at 2235; *Schneider*, Official Translation, slip op. at 13. But even if it persuasively could be argued that lawyers in Puerto Rico play a distinctive role in creating a pluralistic society, and that collective political action by lawyers is therefore uniquely central to the mission of the Puerto Rico bar, compulsory funding of non-legal ideological activities would impose too great a burden on the First Amendment rights of individual members to be constitutionally acceptable. Lawyers who wish collectively to advocate certain political views can band together in a voluntary association, without coercing those with different views to join their ranks.

The Supreme Court cases upholding compelled membership rest on an implicit assumption that "'the cause which justified bringing the group together,'" *see Abood*, 431 U.S. at 223, 97 S.Ct. at 1793 (quoting *Machinists* v. *Street*, 367 U.S. 740, 778, 81 S.Ct. 1784, 1805, 6 L.Ed.2d 1141 (1961) (Douglas, J., concurring)), would be sufficiently narrow that dissenting em-

[14] Throughout the discussion section, our assumption is that defendants would choose to modify the 1986 Rule so that it meets constitutional requirements rather than to design a completely new procedure for protecting dissenters' rights. Defendants are, of course, free to tackle such a project if so inclined. *See Keller*, 110 S.Ct. at 2237-38 (leaving open the possibility that procedures different from those described in *Hudson* could satisfy an integrated bar's obligation to dissenters).

ployees would be forced to associate against their will in only a limited way. As the district court recognized, if objecting members could be required to subsidize any activity that promoted the creation of a strongly pluralistic society, the limitation on compulsory support carved out in *Abood* would be meaningless.

[4] Thus, the district court correctly set the boundaries for the Colegio's use of compulsory dues. The court also described various activities that fall within those boundaries, *see supra* p. 626, and we endorse its list.[15] The district court's discussion of activities, however, dwelled primarily on bar programs that we think fall at an extreme end of the spectrum, and for which there would be little dispute that compulsory financing would be appropriate. We therefore think it worth adding to its catalog both some general principles and some specific examples to assist in categorizing activities as either appropriate or inappropriate for compulsory funding.

Before we begin that list, however, it is necessary to review the United States Supreme Court's rather sketchy references to the propriety of using compulsory dues for "nongermane, nonideological expenditures," *Hudson*, 475 U.S. at 304 n.13, 106 S.Ct. at 1074 n.13. These would include, for example, the costs of members' life insurance or purely social activities. In *Hudson*, the most recent compulsory union dues case, the Court specifically refrained from deciding whether "the category of impermissible expenditures included all those that were not germane to collective bargaining, even if they might not be characterized as 'political or ideological,'" *id.* at 299, 304 n.13, 106 S.Ct. at 1072, 1074 n.13.[16]

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[15] We note that most of the activities listed as non-objectionable by the Puerto Rico Supreme Court, and restated in regulations issued by the Review Board, *see* App. II at 331-334, are within the court's acceptable range. These are described by the regulations as "[a]ctivities closest related to the practice of law and the administration of justice." *Id.* at 331.

[16] A majority of the Court of Appeals in *Hudson had* addressed that issue, and concluded that compulsory dues could not be used for such purposes." *See* 743 F.2d 1187, 1194 (7th Cir. 1984). The Supreme Court saw no need to reach the question, however, because the plaintiffs' challenge was to the

In an earlier case, however, the Court had considered whether expenditures for union social activities could be financed with compulsory dues. *See Ellis*, 466 U.S. at 449-50, 456, 104 S.Ct. at 1893, 1896. After concluding that the Railway Labor Act permitted the union to charge all employees for such expenses, the Court only briefly addressed the First Amendment question:

> Petitioners do not explicitly contend that union social activities implicate serious First Amendment interests. We need not determine whether contributing money to such affairs is an act triggering First Amendment protection. To the extent it is, the communicative content is not inherent in the act, but stems from the union's involvement in it. The objection is that these are *union* social hours. Therefore, the fact that the employee is forced to contribute does not increase the infringement of his First Amendment rights already resulting from the compelled contribution to the union. Petitioners may feel that their money is not being well-spent, but that does not mean they have a First Amendment complaint.[17]

466 U.S. at 456, 104 S.Ct. at 1896 (emphasis in original).

Despite the Supreme Court's reluctance in *Hudson* to confront the "constitutional nongermaneness question," we think the quoted discussion from *Ellis* provides the appropriate analysis for resolving the issue. Moreover, not only is the First Amendment not a factor, but "[t]he very nature of the free-rider problem and the governmental interest in overcoming it

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procedure used to protect dissenters' rights and not to particular expenditures. The Court felt that the procedural requirements would be the same regardless of the outcome of the "constitutional nongermaneness question." 475 U.S. at 304 n.13, 106 S.Ct. at 1074 n.13.

[17] Although the plaintiffs in *Ellis* also challenged mandatory funding of the union's death benefits program, the Court found it unnecessary to reach that issue because the union was no longer the exclusive bargaining agent for the plaintiffs and so they no longer were involved in the death benefits system.

require that the union have a certain flexibility in its use of compelled funds." *Ellis*, 466 U.S. at 456, 104 S.Ct. at 1896. We therefore conclude, as did the district court, that activities incidental to the operation of an association — such as social events and the provision of insurance to members — may be financed with mandatory fees.

[5] 1. Political activities, including lobbying, may be funded from compulsory dues so long as the target issues are narrowly limited to regulating the legal profession or improving the quality of legal service available to the residents of Puerto Rico. *See Keller*, 110 S.Ct. at 2236-37. Thus, for example, the Colegio could lobby in favor of budget appropriations for new judicial positions or increased salaries for government attorneys, or against statutory limitations on attorney advertising or requirements for the certification of legal specialists. *Cf. Gibson* v. *The Florida Bar*, 798 F.2d 1564, 1569 & n.4 (11th Cir. 1986).

It would not be permissible, however, to use mandatory dues for such lobbying if the Colegio's position rested upon partisan political views rather than on lawyerly concerns. For example, while it would be appropriate for the Colegio generally to lobby regarding attorney advertising, it may not use mandatory dues to advocate restrictions only on advertising for legal services in aid of (or opposed to) family planning agencies or abortion clinics. It likewise would be impermissible for the Colegio to use mandatory dues to lobby on any issue pertaining to the political status of Puerto Rico, even if arguably related to the legal profession or the quality of legal services.

[6] 2. Among the activities that could *not* properly be funded with mandatory dues would be lobbying on controversial bills to change the law in ways not directly linked to the legal profession or the judicial system. For example, the bar could not use dissenting members' funds to promote a system of pro-life amendment to the Commonwealth constitution or generate support for a death penalty. *See Keller*, 110 S.Ct. at 2237.

We see no problem, however, in the Colegio's participation in efforts to amend technical, non-ideological aspects of substantive law. For example, the Wisconsin state bar's 1975 legislative program included advocacy on two bills that would appear to have engendered no controversy: one making it clear that land contracts enjoy the same exemption from the Wisconsin Consumer Act as do first lien mortgages, and the other simplifying condominium transactions by abolishing a requirement that floor plans be recorded. *See* T. Schneyer, "The Incoherence of the Unified Bar Concept: Generalizing from the Wisconsin Case," 1983 Am.B.Found.Res.J. 1, 31 (1983) (hereinafter "Unified Bar Concept"). Another example falling into this category would be a bill to allow notaries to use either a stamp or a seal on documents. All of these measures appear politically noncontroversial and designed merely to "'improv[e] the quality of the legal service available to the people of the [Commonwealth],'" *Keller*, 110 S.Ct. at 2236 (quoting *Lathrop*, 367 U.S. at 843, 81 S.Ct. at 1838).

[7] 3. Among the Colegio's activities that clearly fall outside the narrow categories for which financial support may be compelled are the following Colegio-sponsored committees: the Committee for the Study of the Constitutional Development of Puerto Rico from 1977 to 1984, which, among other business, has published a report on the "Procedural Requirements for Decolonization of the United Nations organization"[18];

[18] The Puerto Rico Supreme Court described the work of this committee as follows:

> The Committee for the Study of the Constitutional Development is constituted by attorneys from all political stands. Among the studies it has conducted, the most important are: police corruption as a threat to the democratic system, the electorate's direct means of intervention in the political process. And the third one is the result of a series of reports on the Puerto Rican status issue. One of the reports, which was unanimously approved by the members of the Committee, recommends some minimum requirements that should be guaranteed under any status alternative. Based on these reports, the President of the Bar Association has appeared before the United Nations to present the recommendations of the Committee.
>
> *Schneider*, Official Translation, slip op. at 36 (citations omitted).

the Electoral Process Committee, which was created "to enhance the level of political debate in our country, to enforce compliance with the laws governing the voting process and to frame a code of ethics to regulate public debate among political candidates"; the Special Committee on Nuclear Armament and the Nuclear Arms Ban Treaty in Latin America, and the Committee for the Study of the Proposed Territorial Demarcation of the San Juan and Rio Piedras Delegations. *See Schneider*, Official Translation, slip op. at 48-49; 53; 54.

[8] 4. In many instances, it is likely that activities that may be subsidized with mandatory dues will be combined with those that may not. Consider, for example, a hypothetical annual meeting where business matters of direct concern to the regulation of the legal profession will be discussed, but where the chaplain opens with a long prayer for the health of Fidel Castro, and the featured speaker is a prominent Sandanista. Even if the business meeting takes two hours, and the prayer and speech together take only 35 minutes, we think it likely that the atmosphere would have become so partisan that the proportionate cost of the whole meeting should be deducted from a dissenter's dues. In other words, where the permissible and impermissible are intertwined beyond separation, the objector should be entitled to a full rebate for the cost of the function.

[9] The district court made a similar observation with respect to the Bar's publications, holding that "[e]ach publication stands or falls . . . as an indivisible entity, depending on its editorial policy." 682 F.Supp. at 686. If a magazine is devoted to educational articles about the legal profession or the quality of the legal services available in the Commonwealth, it may be funded by compulsory dues. A magazine that publishes markedly political and ideological material may not rely on that source of funding (unless, perhaps, the magazine publishes a broad spectrum of counterbalancing views).

This list, obviously, is not intended to be exhaustive, but it hopefully will provide some context within which to evaluate other activities.

B. Does the 1986 rule adequately protect the right of dissenters NOT to contribute to other activities?

It is not disputed that the Colegio regularly has engaged in activities that may not be funded with compulsory dues. Assuming that it continues to do so in the future, it must ensure that dissenters' dues are used only for activities germane to the bar's core functions or for other pursuits incidental to the operation of a bar association. The district court concluded that the procedures specified in the 1986 Rule are inadequate to accomplish that task. We agree.

Before turning to the specific procedural deficiencies of the Rule, however, we note our previous observation that there is an argument to be made that "the Colegio's penchant for ideological contention is so pervasive and unremitting . . . that Puerto Rico cannot constitutionally force dissenters to join," *Romany*, 742 F.2d at 40-41. Although the present record leaves that argument unresolved, we are not yet prepared to hold that a rebate and escrow system to protect dissenters is necessarily unworkable. The district court believed that such a system could work and it is clear that the Colegio does engage in some activities that serve the core purposes of a bar association identified by the Supreme Court in *Keller*. Thus, while leaving open the possibility that no such system would suffice, our comments on the Rule are based on the assumption that it could be modified to meet constitutional requirements. *But see* L. Tribe, *American Constitutional Law* § 12-4 at 805 n.5 (2d ed. 1988) (in the case of unions, it may be preferable to require ideological activities unrelated to collective bargaining to be financed from voluntary contributions).[19]

[10] Our view of the Rule's procedural problems coincides with that of the district court, and we therefore shall not revisit at length matters that that court already has covered well.

[19] We also leave open, as did the Supreme Court in *Keller*, *see* 110 S.Ct. at 2238, the alternate possibility that the Colegio should be enjoined permanently from using its name to advance political or ideological causes beyond those for which mandatory financing is permissible.

See Schneider, 682 F.Supp. at 687-89. We emphasize, however, the Rule's two biggest procedural shortcomings: the failure to justify and support adequately an escrow percentage limited to 15% and the need for objections to specific activities as a prerequisite for refunds.

With respect to the escrow percentage, neither the Rule nor the record as a whole offers support for the 15% figure or, indeed, for any specific allocation of the amount of resources devoted to activities either entitled or not entitled to mandatory financing. Fifteen percent would seem, on its face, to be a small proportion. It is the Colegio's obligation at the outset of a dues year to categorize its activities so that an escrow amount can be based on actual anticipated expenditures for non-core activities. Although "absolute precision" in predicting plans and expenses is not required, *see Hudson*, 475 U.S. at 307 n.18, 106 S.Ct. at 1076 n.18, it is insufficient to classify activities only after a member specifically objects to financing them with mandatory dues. This would place too great a burden on members to monitor Colegio activities. *See Abood*, 431 U.S. at 241, 97 S.Ct. at 1802.

[11] In addition, we reject the Colegio's challenge to the district court's imposition of a "buffer" allocation in the escrow amount, *see* 682 F.Supp. at 688-89. Because "absolute precision" in predicting the upcoming year's plans is unlikely, such a cushion will serve to avoid, or minimize, any First Amendment infringement resulting from a higher-than-budgeted expense for non-core ideological activities. Although the Colegio's right to use its funds freely will be compromised if the cushion turns out to be unnecessary, we think it appropriate to err on the side of protecting the First Amendment rights of the Colegio's compelled members. If, over time, it turns out that the Colegio accurately predicts the nature of its annual expenditures, it will be free to seek relief from the buffer requirement. At this time, however, we see no basis on which to second-guess the judgment that such a cushion is appropriate.

The fact that the Supreme Court has not explicitly required such an amount in the past does not render it invalid.[20]

[12] The district court also ably outlined the measures necessary to bring the Colegio into conformance with Supreme Court requirements concerning the method for objecting to expenditures. 682 F.Supp. at 689. As the district court recognized, a primary feature of a constitutional system is that dissenters be able to trigger refunds by means of general objections so that they need not make public their views on specific issues. *See id.* (quoting *Abood*, 431 U.S. at 241, 97 S.Ct. at 1802).[21] Dissenters also may not be required to explain the basis for particular objections beyond detailing why they view a disputed activity to be outside the Colegio's core functions. *See* Regulations § 12.1, App. II at 338 ("The objection shall be raised in a brief document briefly listing the reasons on which the objection is based.")[22]

[13] We, like the district court, decline to invalidate the use of former Justices of the Puerto Rico Supreme Court as members of the three-member Review Board that will deter-

[20] Moreover, such a cushion is not unprecedented. The Chicago Teachers Union rounded up its estimate for expenditures unrelated to collective bargaining and contract administration in establishing a dissenters' rebate to provide a cushion to cover inadvertent errors. *See Hudson*, 475 U.S. at 295, 106 S.Ct. at 1070.

[21] As noted above, it may be that defendants intend that the procedure operate in this fashion, in other words, that a general objection lodged at the beginning of the dues year automatically will entitle that dissenter to a full rebate for the amount spent on all activities unconnected with the Colegio's core purposes. *See supra* n.7.

[22] Thus, one way for an objection procedure to work would be for the Colegio to provide members at the beginning of the dues year with a proposed budget that classifies activities as appropriate or inappropriate for mandatory financing. Based on that classification, the budget would include an escrow percentage for dissenters' dues. Members who filed a general objection at the beginning of the year would trigger an escrow contribution on their behalf and ultimately would be entitled to a rebate for all activities listed as inappropriate for mandatory financing. In addition, members must be able to challenge the placement of particular activities within the "non-objectionable" category. Moreover, the Colegio has the obligation to adjust the refund amount during the year based on actual expenditures.

mine which activities may be funded with compulsory dues. Plaintiffs challenge the impartiality of the Justices because of their participation in the Supreme Court's decision upholding the integrated bar and setting a wide scope for the bar's core functions. We agree fully with the district court's judgment that a panel whose members include former Supreme Court Justices "meets the requirements of an 'impartial decision-maker,' at least facially until appropriate evidence is presented to the contrary." 682 F.Supp. at 689.

C. What steps must defendants take to fulfill their constitutional obligations to dissenters?

[14] As a result of the deficiencies it found with the Colegio's present method of operation, the district court enjoined the Puerto Rico bar association from compelling membership until it either ceased *all* ideological activities not germane to its core purposes or devised an adequate system to protect dissenters' rights. We find no abuse of discretion in the court's decision to impose this injunction, but for various reasons believe that its implementation should be delayed for six months while defendants work to modify their Rule. If, at the end of six months, defendants have failed to submit to the district court a rule that resolves the constitutional problems identified in its opinion and our own, and if no extension of time has been granted for cause by the district court, the injunction will take effect. During this interim period, 100% of dissenters' dues should be held in escrow, to be refunded in full if no adequate procedure is developed to protect their rights.

We have the power, under our supervisory authority, to defer effectuation of the district court's judgment. *See* 28 U.S.C. § 2106; *City of Newport* v. *Fact Concerts, Inc.*, 453 U.S. 247, 257 and nn. 15, 16, 101 S.Ct. 2748, 2754 and nn. 15, 16, 69 L.Ed.2d 616 (1981). *See also Monmouth County Correctional Inst. Inmates* v. *Lanzaro*, 834 F.2d 326, 333 n.10 (3d Cir. 1987) (revising district court order granting preliminary

injunctive relief). Our reasons for doing so in this case are these:

First, as noted above, we think there remains a good possibility that the Colegio *can* operate constitutionally. The Supreme Court of Puerto Rico has listed a number of useful and important functions performed by the Colegio that are directly linked to the regulation of the legal profession and improving legal services, and it appears that an accounting system now exists for determining the direct and indirect cost of any Colegio activity, *see* 682 F.Supp. at 688 n.14. Thus, we think it appropriate to act on the assumption, shared by the district court, that the Colegio will be able to modify its rule to comply with *Hudson*.

Second, the defendants' interest in maintaining an integrated bar is sufficiently weighty that we should hesitate before halting the system completely. It seems more appropriate to allow the Colegio to continue functioning, at least temporarily, with the compelled dues of members who do not object to its activities.

Third, we think that the United States Supreme Court's recent decision on the integrated bar is likely to spur action that defendants previously may have resisted while pursuing their appeals. Before *Keller*, it had been nearly three decades since the Court addressed the integrated bar, in *Lathrop*, and the commentary since that time has questioned the nature and continuing validity of a mandatory bar. *See, e.g.*, "Unified Bar Concept," 1983 Am.B.Found.J., at 67; C. Sorenson, Jr., "The Integrated Bar and the Freedom of Nonassociation — Continuing Siege," 63 Neb.L.Rev. 30, 31 (1983). Now that *Keller* has come down, defendants have an unequivocal need to change their system to ensure its continued operation.

Fourth, we recognize that changes in the Colegio system are not easily made because of the various entities involved in decision-making. The Rule was a creature of the Supreme Court, but it rests upon a foundation of information that is the Colegio's responsibility to maintain. We therefore think it

appropriate to give defendants a substantial period of time to work out a constitutional approach to mandatory Colegio membership.

Finally, a federal court should endeavor to facilitate a proper objective of state and commonwealth government by constitutional means; it should, if possible, avoid frustration caused by the perhaps ill-advised strategies of counsel. Thus, while we understand the district court's inclination at this stage of the proceedings against further indulging the defendants and their lawyers, we think it is worth giving them the benefits of any doubts one more time.

Accordingly, we envision the following course of events:

[15] — The first task is for the Colegio, or an independent agent, to perform the verified accounting required by *Hudson*. The resulting report should categorize activities as suitable or unsuitable for mandatory funding, consistent with the criteria described in Section A above, and the report should list the cost for each activity. This accounting should enable the Colegio to set an amount for the reduction of dues of dissenting members. This accounting should strive as much as possible to reflect reality, perhaps relying on the Colegio's actual expenditures during the last several years as the basis for the projected allocation. *See Hudson*, 475 U.S. at 307 n.18, 106 S.Ct. at 1076 n.18. And in close situations, the accounting should favor the dissenter's right *not* to fund programs they find offensive.

— An independent panel (perhaps the Supreme Court or the Review Board) should review the categories of activities to determine whether all items to be funded with mandatory dues are "necessarily or reasonably incurred for the purpose of regulating the legal profession or 'improving the quality of the legal service available to the people of the [Commonwealth].'" *Keller*, 110 S.Ct. at 2236. The panel may wish to solicit critiques and proposals from interested parties, such as plaintiffs, to ensure that the final remedy is as fully developed as possible.

— The objection procedure must be clarified or modified consistent with the district court's discussion. *See supra* pp. 626-27, 613.

— The new rule with relevant supporting materials, or some alternative, should be submitted to the district court for review *within six months* or, if a limited extension is granted, within such later period. The court must be given sufficient data to enable it to evaluate the categorization of expenses and any proposed rebate/escrow percentage. This would include, for example, copies of past Colegio budgets.

— If defendants do not modify the Colegio system within the required time, the district court's injunction will go into effect and the Colegio will be required to operate solely as a voluntary association until it stops *all* ideological activities outside its core purposes relating to the legal profession.

IV. *Stamps*

Under Puerto Rico law, lawyers must attach notarial and forensic stamps issued by the Colegio to many official documents as a means of authenticating them and as a prerequisite to filing them in court. *See* P.R.Laws Ann. tit. 4, §§ 783, 785, 1006, 1038. The stamps are sold at the Commonwealth's internal revenue offices by government employees, but all proceeds are turned over to the Colegio. The Colegio is not charged for any administrative or processing costs.

The 1986 Rule stated that stamp proceeds could be used to pay for only the following items: bar members' life insurance, legal aid to indigents, legal advice to the community, processing of complaints regarding the conduct of bar members in the practice of the profession, publication of judicial opinions "and for any other purpose comprised within the duties and purposes of the Bar Association." *Schneider*, Official Translation, slip op. at 23. The Rule specified that the funds shall not be used for "objectionable activities."

Plaintiffs complain both about the use of their tax monies to support the Colegio, through the government's involvement in selling the stamps, and the use of the stamp fees to fund Colegio activities with which they disagree. We depart in only one

respect from the district court's resolution of the stamps problem.

[16] As that court observed, if an adequate mechanism for protecting dissenters' rights is implemented, and no revenues from the sale of stamps are used to fund activities outside the Colegio's proper core functions, no constitutional problem will remain.[23] Although there still would be disparity among lawyers in the amounts paid to the Colegio, based on their need for Colegio stamps, we see no basis for challenging the Commonwealth's arguably rational judgment to impose a larger share of the burden of funding core activities on those lawyers who use the judicial system more frequently.[24]

The district court believed, however, that if no adequate method is devised to protect dissenters' rights with respect to

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[23] It seems that a proper approach to the budgeting process would be to deduct, at the outset, the amount of the stamp revenues from the total estimated funds needed by the Colegio for core activities. It would then be possible to calculate the additional amount needed from dues to fund the remainder of the bar's budget, broken down into the amount needed to fund core activities and the amount needed to fund all other activities. Dissenters would be entitled to a rebate or dues reduction for the portion of dues assessed for all non-core activities.

[24] It is not the case, as plaintiffs argue, that dissenting attorneys who purchase a large number of stamps will be improperly subsidizing the Colegio's non-core activities through their stamp fees. Assuming a constitutional dues procedure is implemented, the Colegio will be required to specify the cost of its non-core activities, and those items will be funded only by means of the portion of mandatory dues that dissenters will not be charged.

Although it is true that any amount raised through stamps will not need to be raised through dues, this is not the sort of bookkeeping deception rejected by the Supreme Court in *Abood*, 431 U.S. at 237 n.35, 97 S.Ct. at 1800 n.35. The court there was referring to a system in which all members are charged the same fee but dissenting members' payments are allocated only to core purposes while other members' payments could be used for any purpose. In those circumstances, where there is no discount for dissenters, dissenters would pay more than their pro rata share of core expenses. That sort of disparity differs from the disparity in attorney purchases of Colegio stamps because the stamp fees paid by *all* lawyers, dissenting or not, receive identical treatment. Unless it were shown that, as a rule, dissenting attorneys used substantially more stamps than non-dissenting ones, there is no disproportionate burden placed on *dissenting* attorneys for the funding of Colegio core activities. There is therefore no First Amendment violation.

mandatory dues, the stamp requirements, like membership in the Colegio, must be made voluntary. The court held that restricting the use of stamp revenues to non-objectionable activities is insufficient as a solution because dissenters through their stamp purchases would then, in effect, be subsidizing ideological activities by allowing a larger portion of the voluntary dues to be used for them. We disagree. We see no difference with respect to the stamp proceeds, whether or not the Colegio can compel membership and dues, provided the stamp fees are used solely for proper core activities. In both circumstances, the Colegio has the same funds available for objectionable activities — only some portion of the dues of consenting members. Even if the Colegio chose to use all of the voluntary dues for objectionable activities, and funded its core activities solely with stamp revenues, we see no constitutional problem. The Commonwealth's decision to fund core bar association activities in that manner would put the core funding burden not on *dissenters* but on stamp purchasers. This allocation of burden does not implicate the First Amendment, and the Colegio therefore may collect and use the stamp fees for core activities whether or not it may compel membership.

[17] If the Colegio should be unable to devise a satisfactory method to protect dissenters' rights, and thus be required to change to a voluntary bar, this would affect the stamp issue in one respect. If Colegio membership is voluntary and association benefits therefore do not inure to all lawyers, it would plainly be inappropriate to use stamp revenues for any activities that, while not ideological, do not *directly* serve the core purposes of regulating the legal profession or improving the quality of legal services. To charge nonmembers fees to help pay for members' life insurance, for example, strikes us — as it did the district court — as improper. *See* 682 F.Supp. at 690. In that event, the Commonwealth would be compelling certain individuals to help pay for a *private* benefit system for other individuals, an arrangement that triggers due process concerns if not First Amendment ones. We therefore hold that,

if the Colegio becomes a voluntary association, stamp revenues may be used to finance only core activities not including "non-germane, nonideological" ones. *Hudson*, 475 U.S. at 304, n.13, 106 S.Ct. at 1074, n.13.

As a final note, if the Colegio is unable to show that stamp proceeds are, in fact, isolated from its other revenues and allocated only to appropriate activities, it would of course be barred from requiring stamp fees.[25]

With respect to the government's involvement in the sale of the stamps, we subscribe to the district court's view that no remedy is warranted. If stamp revenues are segregated appropriately, the government's assistance in selling the stamps will not support a First Amendment claim. The government simply would be involved in collecting funds that are used to promote the substantial government interests of regulating the legal profession and improving the quality of legal services available in the Commonwealth. If the Colegio cannot demonstrate that the use of stamp fees is properly limited, however, the sale of stamps would be allowed to continue only on a voluntary basis, and plaintiffs then would lack standing to challenge the government's role in the stamp program. As the district court observed, plaintiffs presumably would choose not to purchase the stamps, and their complaint therefore would depend on their status as taxpayers and the use of some portion of their tax dollar to help the Colegio finance its ideological activities.

In order to establish state taxpayer standing, plaintiffs must show that the challenged activity involves "a measurable appropriation" or loss of revenue, and "a direct dollars-and-cents injury" to themselves, *Doremus* v. *Board of Education*, 342 U.S. 429, 434, 72 S.Ct. 394, 397, 96 L.Ed. 475 (1952). *See also, e.g., District of Columbia Common Cause* v. *District of Columbia*, 858 F.2d 1, 4-5 (D.C. Cir. 1988); *Donnelly* v.

[25] For the six-month interim period, all stamp revenues, like dissenters' dues, should be placed in escrow. Defendants may, however, ask the district court to lift this requirement before the dissenters' remedy is modified upon a showing that stamp fees are fully segregated and used only for core activities.

Lynch, 691 F.2d 1029, 1030-32 (1st Cir. 1982), *rev'd on other grounds*, 465 U.S. 668, 104 S.Ct. 1355, 79 L.Ed.2d 604 (1984). Plaintiffs have failed to make such a showing. The stamps are sold at government offices that exist for another purpose, and plaintiffs do not allege that additional employees are hired to handle the stamp business. At best, it might be argued that there are some incidental expenses incurred by the government, but this does not constitute the "direct and particular financial interest" necessary to establish standing. *Doremus*, 342 U.S. at 435, 72 S.Ct. at 398.

V. *Damages*

[18] Plaintiffs contend that the district court erred in awarding each of them only $1 in nominal damages for the deprivation of their First Amendment rights. The court declined to make a higher award because "'[t]he evidence is too vague for the Court to establish through anything other than speculation, the amount of damages suffered by these Plaintiffs.'" *Schneider*, 682 F.Supp. at 691 (quoting *Schneider*, 565 F.Supp. at 979). Plaintiffs acknowledge that there was no direct proof of damages, but make an emotional appeal for financial relief in an amount reflecting the seriousness of the defendants' First Amendment violation.

We have sympathy for plaintiffs' position, and recognize the risk that nominal damages will tend to minimize the seriousness of defendants' violation and plaintiffs' injury. Nevertheless, we are unable to say the district court abused its discretion in making the $1 awards. From all that appears in the record, plaintiffs have submitted no evidence of the nature and extent of the harm they have suffered, and they have cited no precedent imposing on the court the obligation to speculate on the extent of their injury. In the absence of *any* proof of damages, we think the district court acted within its discretion in declining to award more than a nominal sum. *See Memphis Community School Dist.* v. *Stachura*, 477 U.S. 299, 308 n.11,

106 S.Ct. 2537, 2543 n.11, 91 L.Ed.2d 249 (1986) ("[N]ominal damages, and not damages based on some undefinable 'value' of infringed rights, are the appropriate means of 'vindicating' rights whose deprivation has not caused actual, provable injury.") (citing *Carey* v. *Piphus*, 435 U.S. 247, 98 S.Ct. 1042, 55 L.Ed.2d 252 (1978)). *See also id.* 477 U.S. at 315-316, 106 S.Ct. at 2547 (Marshall, J., concurring) (quoting *Hobson* v. *Wilson*, 737 F.2d 1, 62 (D.C. Cir. 1984)) (injury to a First Amendment-protected interest may be compensated with substantial damages, but "only to the extent that it was 'reasonably quantifiable'").

V. *Conclusion*

We summarize our primary holdings:

1. The 1986 Rule was the product not of judicial decisionmaking but of Puerto Rico Supreme Court rulemaking, and the district court therefore had jurisdiction to review its merits. In addition, our review is barred neither by preclusion principles nor procedural defaults.

2. The Colegio may use mandatory dues and fees only for those expenditures that are "necessarily or reasonably incurred for the purpose of regulating the legal profession or 'improving the quality of the legal service available to the people of the [Commonwealth].'" *Keller*, 110 S.Ct. at 2236. It may, in addition, use such funds to finance activities incidental to the operation of a bar association, such as social activities and insurance programs.

3. Activities that may be funded with compulsory dues, therefore, generally must "revolve around the role of the lawyer as lawyer, rather than relying on the lawyer's more generic role as an informed and perhaps influential member of a complex society," *see supra* p. 626. When ideological activities outside the bar's core purposes are intertwined beyond separation with activities within them, dissenters may not be charged for any portion of the challenged program.

4. The Colegio system of mandatory membership, as defined by statute and the 1986 Rule, does not presently meet constitutional standards. It defines too broadly the range of activities that may be funded with compulsory dues. Its two primary procedural defects are the failure to support the 15% escrow amount and the provision, at least on the Rule's face, that refunds are triggered only by objections to specific activities.

5. Defendants shall have six months from the date this judgment becomes final to submit a modified version of its rule, or an alternative, to the district court, during which time 100% of dissenters' dues must be held in escrow. If, at the end of that six-month period, defendants have failed to submit to the district court a procedure for resolving the constitutional problems identified in its opinion and our own, and if no extension has been granted for cause, the injunction imposed by the district court regarding compulsory dues will take effect.[26] That injunction bars the Colegio from compelling membership until it either ceases all ideological activities not germane to its core purposes or devises an adequate system to protect dissenters' rights.

6. The Colegio may collect stamp fees so long as the funds are segregated from other revenues and used only for core purposes. Plaintiffs may not challenge the use of government facilities to sell the Colegio stamps.

7. The district court award of $1 in nominal damages to each plaintiff is affirmed.

Affirmed in part, reversed in part, modified and remanded for further proceedings consistent with this opinion. Costs to plaintiffs.

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[26] We expect that defendants immediately will begin a good-faith effort to revise the Colegio's compulsory membership system, and will submit their proposal to the district court as soon as possible. We further expect that the district court will need a period of time to review that proposal. We do not intend that the injunction take effect during the review so long as it appears that defendants have made a good-faith effort to fulfill their constitutional obligations to plaintiffs. We leave it to the district court to determine when, if at all, the injunction should take effect after the six-month delay.

APPENDIX B

United States Court of Appeals
For the First Circuit

No. 88-1937

ROBERT E. SCHNEIDER, JR., ET AL.,

PLAINTIFFS, APPELLEES,

v.

COLEGIO DE ABOGADOS DE PUERTO RICO,

DEFENDANT, APPELLANT.

No. 88-1938

ROBERT E. SCHNEIDER, JR., ET AL.,

PLAINTIFFS, APPELLEES,

v.

COLEGIO DE ABOGADOS DE PUERTO RICO, ET AL.,

DEFENDANTS, APPELLEES.

CARMEN ANA CULPEPER, ETC., ET AL.,

DEFENDANTS, APPELLANTS.

No. 88-1939

ROBERT E. SCHNEIDER, JR., ET AL.,

PLAINTIFFS, APPELLANTS,

v.

COLEGIO DE ABOGADOS DE PUERTO RICO, ET AL.,

DEFENDANTS, APPELLEES.

BEFORE

Breyer, Chief Judge,
Coffin, Senior Circuit Judge,
Campbell, Torruella*, Selya and Cyr, Circuit Judges,
Pieras**, District Judge

ORDER OF COURT
Entered December 20, 1990

The panel of judges that rendered the decision in these cases having voted to deny the petition for rehearing and the suggestion for the holding of a rehearing en banc having been carefully considered by the judges of the Court in regular active service and a majority of said judges not having voted to order that the appeal be heard or reheard by the Court en banc,

It is ordered that the petition for rehearing and the suggestion for rehearing en banc be denied.

By the Court:

/s/ Francis P. Scigliano, Clerk

*Circuit Judge Juan R. Torruella is recused.
**Of the District of Puerto Rico, sitting by designation.
(cc: Messrs. Schneider, Jr., Anduze Montano, Ms. Rodriguez-Rodriguez)

APPENDIX C

United States District Court
District of Puerto Rico

Civ. Nos. 82-1459 (TR), 82-1513, 82-1514 and 82-1532.

ROBERT E. SCHNEIDER, JR. ET AL.,
PLAINTIFFS,

v.

COLEGIO DE ABOGADOS DE PUERTO RICO, ET AL.,
DEFENDANTS.

OPINION AND ORDER

TORRUELLA, *Circuit Judge*

I. *History of the case*

Plaintiffs in this case have presented the court with a challenge, under 42 U.S.C. § 1983, to the requirement that they belong to the integrated bar association, the Colegio de Abogados de Puerto Rico ("Colegio" or the "Bar"), as a condition to the practice of law in Puerto Rico. The Association is funded through compulsory annual dues and the proceeds from stamps that must be purchased and affixed by lawyers and notaries to papers filed with the courts and to notarized documents. The court must therefore evaluate that integrated bar scheme, including the escrow/rebate procedure built into it. It must decide whether compulsory membership in the Colegio violates dissenting members' non-associational rights under the First Amendment, in light of the importance

traditionally assigned to those rights, and in view of the governmental interests that prompt the regulation of attorneys and the practice of law.

In order to simplify the reader's task, the history of this hoary case will again be set forth. The Colegio instituted disbarment proceedings in 1977 against ninety-nine attorneys for failure to pay their annual dues. All but two—Robert E. Schneider and Hector R. Ramos Diaz—paid the dues. These two argued that Law Number 43, 4 L.P.R.A. § 771, *et seq.* (establishing the Colegio de Abogados) violates the Constitution of the Commonwealth of Puerto Rico. The Supreme Court of the Commonwealth received the report of a Special Master in September of 1980, entertained proofs and stipulations by the parties until March of 1981, and issued its opinion. *Colegio de Abogados* v. *Schneider*, 112 D.P.R. 540 (1982) (hereinafter the "1982 Opinion"). That court ordered Schneider and Ramos to pay all dues owing the Colegio, and upheld the constitutionality of the integrated bar under the Constitution of Puerto Rico. It also announced that a procedure would be established, in cooperation with the Colegio, to ensure that dissenting members of the Bar would not be compelled to finance "ideological" activities through their bar dues.

In spite of the promised procedure, Schneider and Ramos refused to pay, and were consequently disbarred. They and three other plaintiffs (who had been paying dues and were not disbarred or subject to the 1982 Opinion) brought suit in federal court under 42 U.S.C. § 1983. That suit was limited to a claim for declaratory and injunctive relief from their *prospective* obligation to pay dues and belong to the Colegio. *Schneider* v. *Colegio de Abogados*, 546 F. Supp. 1251 (D.P.R. *aff'd in part, rev'd in part sub nom., In re Justices of the Supreme Court of Puerto Rico*, 695 F.2d 17 (1st Cir. 1982).[1]

[1] In that decision the Court of Appeals dismissed plaintiffs' action against the Justices, except as nominal parties. *But cf. Forrester* v. *White*, 56 U.S.L.W., 4067, 4069-70 (U.S. Jan. 12, 1988), (no immunity from suit for damages by judges for administrative or rulemaking actions).

This court thus expressly dismissed "[a]ll allegations or claims seeking in any way to modify, alter, challenge, or otherwise affect the outcome of the suspension for non-payment of *past* dues of plaintiffs Schneider and Ramos in [the 1982 Opinion], . . . for lack of jurisdiction." *Id.* at 1276 (emphasis supplied).

Next this court addressed itself to the substantive issues presented by this case. *Schneider* v. *Colegio de Abogados*, 565 F. Supp. 963 (D.P.R. 1983), *vacated sub nom.*, *Romany* v. *Colegio de Abogados*, 742 F.2d 32 (1st Cir. 1984). On the record before it, the court found that "the Colegio engages in ideological and/or political activity of a pervasive and continuous nature. . . ." *Id.* at 965. It also noted that "there is no way of determining, from an accounting standpoint, the dollar amount of [support for ideological activities] except to conclude that from the pervasiveness, scope and breadth of this type of activity, it is obvious that the backing has been and is considerable." *Id.* at 971 (citing the testimony of Juan Espiet, the Colegio's auditor). In other words, the Colegio's expenditures in support of ideological activities were inextricably intermingled with its other, non-controversial expenditures.

On the basis of these and other findings, this court held that, as applied, Law No. 43 establishing an integrated bar violated dissenting attorneys' rights under the First Amendment. It ordered, in consequence, that the defendants (except for the Justices of the Supreme Court) be enjoined from taking any action based on plaintiffs' refusal to pay either the compulsory bar fees or the legal and notarial stamps. *Id.* at 979.

When called upon to review this opinion, however, the First Circuit declined to comment on the merits of the adjudication. *Romany* v. *Colegio de Abogados de Puerto Rico*, 742 F.2d 32 (1st Cir. 1984). Instead, it found that this court should have abstained from deciding the issue until the Puerto Rico Supreme Court should issue the remedy it promised in its 1982

Opinion. *Id.* at 40. The First Circuit grounded its holding on several premises that deserve mention here. It pointed out first that the Supreme Court had interpreted the Commonwealth's Constitution to require some sort of remedy for dissenting lawyers, parallel to the remedy required by the United States Supreme Court for dissenting workers in closed shop labor cases. *Id.* at 40 (citing *Machinists* v. *Street*, 367 U.S. 740 (1961); *Railway Clerks* v. *Allen*, 373 U.S. 113 (1963); *Abood* v. *Detroit Board of Education*, 431 U.S. 209 (1977).

The First Circuit commented also that the Commonwealth Court has the power to determine the grounds for admission to the bar. It could, therefore, fashion a procedure parallel to that suggested in the above-cited cases, to safeguard dissenters' associational freedoms. Since the Supreme Court of Puerto Rico declared itself to be in the process of doing just that, the Court of Appeals reasoned, the federal courts should await the result. "[W]hile even provision of a remedy in *complete* compliance with *Abood* and its progeny would not necessarily signal the end of plaintiffs' federal case, it would surely transform it." *Romany*, 742 F.2d at 41 (emphasis added). The First Circuit added:

> Conversely, of course, to the extent whatever remedy the Supreme Court of Puerto Rico approves falls short even of the standards established in *Abood* and *Ellis*, plaintiffs will have a different, more specific and more powerful federal constitutional claim.

Id. at 42.

The Court of Appeals, as an interim measure, decided that the plaintiffs should put 50 percent of their dues into an escrow account, to be distributed to the Colegio and the plaintiffs pursuant to a final resolution of this litigation. Citing *Ellis* v. *Brotherhood of Railway Clerks*, 466 U.S. 435, 444 (1984) the First Circuit made the following statement:

> [W]e do not decide now whether dues reduction alone is a satisfactory answer to plaintiffs' complaint; but at least it is clear that, at a minimum, dissenting attorneys may not be forced to subsidize ideological activity outside the ambit of activities for which membership may properly be compelled. This being so, plaintiffs should not be forced to pay full dues to the Colegio while this litigation proceeds.

Romany, at 44.

This court accordingly held this suit in abeyance until the Puerto Rico Supreme Court should complete its rule-making procedure. The new rules for dealing with dissenting attorneys' dues finally issued on June 26, 1986, in the form of an opinion. *Schneider* v. *Colegio de Abogados*, 86 J.T.S. 10 (June 26, 1986) (hereinafter, the "1986 Rule").[2] The specific details of these rules will be explored further in considering their sufficiency under the First Amendment; for the moment it will suffice to sketch in their broad outlines. The Commonwealth court concluded that compulsory bar membership, the imposition of dues, and the required affixation of stamps (with proceeds to the bar) on legal documents were all constitutionally valid. It also decided that the Colegio should be free to engage in any activity authorized by Law No. 43, or by Court-ordered rules. It found, most importantly, that "the

[2] As this court held on August 21, 1987, while the "remedy" was issued in opinion form, with a case heading, it is nonetheless "a rule promulgated in a non-judicial proceeding. It looks like a rule, reads like a rule, and acts like a rule." *Schneider* v. *Colegio de Abogados de Puerto Rico*, 670 F. Supp. 1098, 1102 (D.P.R. 1987).

The Court attaches the "rule" label to the 1986 opinion not to engage in semantic game-playing, but in order to emphasize the opinion's true nature, and to avoid even the appearance of reviewing a judicial decision of the highest court of Puerto Rico. In the exercise of an over-abundance of care we state that it is only the validity of the 1986 Rule, as applied to the facts presented to this court, that we consider to be the case and controversy before this court.

Bar Association may, constitutionally, pronounce itself on idelological matters, but that the members who dissent from such pronouncements are entitled, under the Constitution of Puerto Rico, to object to the use of their contributions or of part thereof for the ideological activities they do not approve." *Schneider*, 86 J.T.S. 60, Official Translation at 1-2.

In order to protect this right to object, the court set up an interest-bearing escrow account, into which 15% of dissenting attorneys' fees would be deposited. At the end of the year, dissenting attorneys could specify particular "objectionable" activities, and receive a refund of a proportion of their dues equal to the proportion of total dues expended on those activities. Attorneys were also given the option of objecting throughout the year, on a case-by-case basis, to particular activities. A three-member panel, composed of retired members of the judiciary, was established to determine what activities are truly "objectionable," and to decide if the 15% figure should be altered at some later date.

The Puerto Rico Court opted for the term "objectionable" rather than "ideological" in describing impermissible expenditures. *Schneider*, 86 J.T.S. 60, Official Translation at 17. That decision was made, apparently, because the court felt that the Bar not only can and should speak out on many ideological issues, *Schneider*, 112 D.P.R. 540, 551 (1982), but can compel objecting attorneys to fund some of those expressions, as long as they are "comprised within the Bar Association's purposes and ends which are germane thereto. . . ." 86 J.T.S. 60, Official Translation, at 17. The Bar Association's purposes—and, in consequence, the content of "objectionable activities"—are to be determined by reference to the powers granted the Bar by the Legislature or the Puerto Rico Supreme Court. *See, Id.*, Official Translation at 17-18.

The issuance of the 1986 opinion reactivated the case now being decided. *Schneider*, 742 F.2d 32, 44 (1st Cir. 1984) ("The district court may proceed after the Supreme Court of

Puerto Rico has finally determined what remedy to provide. . . ."). This court entertained several motions, set a hearing date, and reopened the record to allow the parties to introduce additional evidence. The parties declined to present additional witnesses at the time of the hearing and limited their evidence to mostly irrelevant documents. The parties also chose—and this is of crucial significance for today's decision—to stipulate "that activities similar in nature to those undertaken by the Colegio prior to 1983 have continued".[3]

The defendant Bar Association then brought a motion to dismiss for lack of jurisdiciton which the court decided this past August 21. *Schneider* v. *Colegio de Abogados de Puerto Rico*, 670 F. Supp. 1098 (D.P.R. 1987). That opinion explained that this case did not constitute a review of any issues adjudicated by the Supreme Court of Puerto Rico in the earlier disbarment proceedings (the 1982 Opinion). Rather this case constitutes a challenge under the *federal* constitution to an integrated bar scheme. A challenge that was affected, but not mooted, by the Supreme Court of Puerto Rico's decision to implement—out of concern for the requirements of the Constitution of the Commonwealth of Puerto Rico—an escrow/rebate program for objecting attorneys.

This court found that, first, defendants had failed to challenge on appeal this court's initial assertion of jurisdiction. In any event, it held,the Supreme Court was acting in its rule-

[3] The Supreme Court of Puerto Rico, in its 1986 rule/decision, found that the Colegio's ideological activities are de minimis. The Colegio now argues that these findings are somehow binding on the court. That argument, however, is patently inconsistent, in light of the court's extensive findings in 1983, with the Colegio's stipulation set forth above. Nevertheless, it is the stipulation that binds the parties to this case. The court notes, however, that the perceived factual inconsistency between this court's findings and the Commonwealth's are due, at least in part, to a different conception of what are ideological activities.

More importantly, defendants failed, notwithstanding the Court's repeated invitations to that effect, to present evidence concerning Colegio's non-ideological activities. *See* Appendix A, which is a partial transcript of the proceedings.

making capacity in promulgating the 1986 Rule, and federal adjudication of the constitutionality of a rule is appropriate even if the rule is enunciated by the highest court of the Commonwealth. Furthermore, the case against Ramos and Schneider had ended already with their disbarment and subsequent reinstatement. *See Schneider*, 670 F. Supp. at 1102-03; *Schneider*, 546 F. Supp. 1251, 1274 (D.P.R. 1982). And, in fact, the 1986 Rule is not a remedy limited to the parties in a certain case, but applies to all dissenting attorneys whether or not they were parties to any of the cases discussed so far.

In that motion, the Colegio also claimed that either res judicata or collateral estoppel bar plaintiffs' claims in this court. Again, these issues were decided in this court's 1982 opinion, *see Schneider*, 546 F. Supp. at 1268-74, and not appealed, *see Romany*, 742 F.2d at 37 n.6, and are therefore the law of the case. *Schneider* 670 F. Supp. 1103. These objections lack substance in any event, as this court pointed out, because the requisite pefect identity for res judicata does not exist. *Id.* at 1104-05; and beacuse the issues being decided here were not actually litigated or addressed by the Puerto Rico Supreme Court in its 1982 adjudication, in such a way as to trigger the issue-preclusive effect of collateral estoppel. *Id.*[4]

Before considering the relevant constitutional principles, it may be important to point out the reasons for the dissenters' discontent. This court found in 1983, and the parties' stipulation, *ante* at p. 8, now puts beyond dispute, that "the Colegio engages in ideological and/or political activism of a pervasive and continuous nature. . . ." *Schneider*, 565 F. Supp. 963, 965

[4] The court decided these issues in 1982. *See Schneider*, 546 F. Supp. 1251, 1266-74. In 1987 it reconsidered, and again decided these issues adversely to the defendants. *See Schneider*, 670 F. Supp. 1098 (D.P.R. 1987). It continues to find that reasoning persuasive, and deeply regrets that counsel for the Colegio continues to waste its time and the court's by devoting at least 27 of 50 pages in its latest Memorandum to the court, filed a short two months after this last opinion, to these twice-settled issues. Counsel would have done well to address himself more single-mindedly to the merits of this case—the only issues in contention today.

(D.P.R. 1983). The court attempted to highlight the extent of the Colegio's involvement in issues of a highly partisan and divisive nature by giving examples of its activities, *see id.*, at 965-71. Because of the importance of these findings of fact, and their present relevance in view of the pretrial stipulation of the parties they are reproduced hereinafter (the footnotes in the original findings are excluded only for convenience; they are nevertheless part of our findings).

II. *Findings of Fact*

(1) At least since 1973, the President of the Colegio has made annual appearances before the United Nations to present the "official" position of the Colegio with regard to the political status of the Commonwealth of Puerto Rico to the effect that the Commonwealth is a colony of the United States, and to request that the "case" for its decolonization be submitted for action to the United Nations General Assembly. This position is espoused as representing the views of *all* the members of the Colegio.

The appearances by the Colegio before the United Nations' Decolonization Committee, as well as the substance of the Colegio's position therein, have received wide-spread publicity in Puerto Rico and in the international news media.

(2) The Board of Governors has adopted many resolutions dealing with diverse topics of an ideological and/or political nature. These include among others: condemning the Federal Bureau of Investigation for "intervention" with the Puerto Rican independence movement and its leaders (Plaintiffs' Exhibit 44); opposing an increase in the number of Federal Judges in Puerto Rico as an "attempt to fortify Federal Control over the island contrary to the duty of Congress to recognize the right of Puerto Rico to assume full sovereignty" (Plaintiffs' Exhibit 46); requiring that the President of the United States order the Navy to cease target practice in the island of Vieques

and withdraw therefrom, "and that this resolution be sent to the Puerto Rican Legislature, to Congress, to the President, to the Decolonization Committee of the United Nations and to the media for massive promulgation" (Plaintiffs' Exhibit 49); resolving to "orient and inform" the people of Puerto Rico regarding the resolution of the Decolonization Committee of the United Nations regarding Puerto Rico (Plaintiffs' Exhibit 235 at p. 14. Resolution No. 6); condemning the Legislature of Puerto Rico for its "distortion [of] the historical truth" in condemning the previously referred to resolutions of the Decolonization Committee (Plaintiffs' Exhibit 235 at p. 29, resolution No. 14); requesting the President of the United States that he release four Puerto Rican Nationalists convicted of participating in the shootings in Congress in 1952 (Plaintiffs' Exhibit 61); opposing a new voter identification system proposed by the Puerto Rico Electoral Committee (Plaintiffs' Exhibit 62); repudiating the Somoza regime in Nicaragua, supporting the Sandinista Front of National Liberation, and asking the United States to recognize the "provisional Government of National Reconstruction" (Plaintiffs' Exhibit 235 at p. 66, Resolution No. 32); condemning the Russian invasion of Afghanistan (Plaintiffs' Exhibit 235 at p. 91, Resolution No. 43); expressing support for Olympic sports and that the Puerto Rico Olympic Committee be the one to decide whether or not to boycott the Moscow Olympic Games (Plaintiffs' Exhibit 235 at p. 92, Resolution No. 44); stating the Colegio's concern "in the name of all qualified voters" as to the state of the electoral process and authorizing the president of the Colegio to name a committee "to watch and guarantee the purity of the electoral process" (Plaintiffs' Exhibit 235 at p. 102, Resolution No. 51); expressing the Colegio's solidarity with the people of El Salvador and condemning the governing Military Junta (Plaintiffs' Exhibit 235 p. 114, Resolution No. 2); endorsing and supporting a march to be held favoring the movement to get the Navy to leave Vieques (Plaintiffs' Exhibit 236 at 129, Resolution No.

10); asserting the "defense" of Puerto Rican culture and rejecting "the efforts of the Commonwealth with relation to the Institute of Puerto Rican Culture as attempts to destroy the cultural heritage of Puerto Rico" (Plaintiffs Exhibit No. 235 at p. 135, Resolution No. 13); criticizing the United States for transferring Haitian refugees to Puerto Rico and demanding their immediate release to the mainland (Plaintiffs' Exhibit 235 at p. 149, Resolution No. 21); condemning the United States "for imposing a concentration camp on Puerto Rico in complicity with the Government of Haiti" (Plaintiffs' Exhibit 235 at p. 167, Resolutiom No. 30); opposing the use of the Federal Grand Jury system in Puerto Rico (Plaintiffs' Exhibit 235, at p. 137, 151, 162, Resolutions Nos. 14, 22, 28); blaming the police and the University Administration for the use of force in a strike by students at the University of Puerto Rico (Plaintiffs' Exhibit 235 at p. 201, Resolution No. 42); condemning the draft as a "blood tax paid by Puerto Ricans in the four wars fought in the Armed Forces of the United States" (Plaintiffs' Exhibit 235 at p. 203, Resolution No. 43).

All of the above have been widely disseminated by the Colegio throughout the news media, as a matter of practice and routine.

(3) The physical facilities of the Colegio have been routinely used for ideological and/or political activities unrelated to the purposes of the Colegio. These activities have included among others: a concert to raise funds for the accused in the armed robbery of a Wells Fargo truck; a press conference by the "Committee for the Defense of Our Dignity"; a press conference by the "Committee for the Defense of Democracy in Haiti"; numerous press conferences by labor unions; assembly of the "National Committee for the Defense of Vieques"; meetings of the "Committee for the Selection of Celeste as Mayor"; a press conference of the "Pastors' Association"; a seminar about the "organizational and political aspects of the Grand Jury"; press conferences of the Puerto Rican Socialist

party; press conference of the "United Committee Against Repression"; public hearing of the Central Committee of the Popular Democratic Party; meetings to organize a defense committee by the Puerto Rican Socialist League; a meeting of the leadership of the Popular Democratic Party in San Juan; a meeting of the San Juan Zone of the Puerto Rican Socialist Party; an organizational meeting of "Citizens interested in the improvement of TV"; meetings of the "Crusade for the Rescue of Vieques"; a press conference of the "Artists in Favor of Artistic Freedom"; commemoration of the anniversary of the death of Dr. Pedro J. Chamorro; a press conference of the "Committee for the Defense of Puerto Rican Culture"; a press conference and meetings of the "Committee for the Defense of Nicaragua"; meetings of the "Law Students' Council" in connection with the strike at the University of Puerto Rico; a concert by the "Committee for the Defense in Support of the Puerto Rican Prisioners of War"; a press conference of the "Committee for the Rescue of Villa sin Miedo," as well as various meetings and conferences related thereto; a movie-showing by "Claridad," the official newspaper of the Puerto Rican Socialist Party, dealing with education in Cuba; a press conference by the Federation of University Students for Independence in connection with the "situation" at the University of Puerto Rico; an activity of the Puerto Rican Socialist Party in support of Cuba; a "cultural-political" activity by the "Committee for the Defense of Nicaragua"; a press conference by the local of the Professional Air Traffic Controllers Organization regarding their negotiations and strike; a showing of the movie "El Salvador; the people shall triumph," by the "Puerto Rican Committee in Solidarity with the Salvadoran People," as well as numerous other activities by said organization; a conference by the Dominican Revolutionary Party; meetings and press conferences of the "Committee Against the Uniform Increase in Tuition" of the University of Puerto Rico; a press conference of the Vieques Fishermen's

Association regarding military maneuvers in the Caribbean Area; a press conference by the "Puerto Rican Ecumenical Social Action Committee" about the role of the "Church in the 80's"; an organizing meeting of the New Progressive Party followers of "Hernan Padilla for Governor"; the annual assembly of the "Puerto Rican Confederation of Spiritualists"; a press conference of the "National Ecumenical Movement" in support of the people of El Salvador.

Many of these activities were held without any charge being made by the Colegio to the sponsoring group, or with only a nominal fee being charged. Irrespective of whether or not a charge is made for the use of the Colegio's facilities, because of the continuous nature of these activities and the widespread publicity given to the fact that they take place in the Colegio's premises, a general impression is given that the Colegio is somehow associated in an active manner with at least some of these activities. This general impression is buttressed by the nature of the resolutions approved by the Board to which we have previously alluded, many of which in fact appear to complement the above-mentioned activities. The Colegio's total failure to disavow its sponsorship of the activities held within its premises does nothing to dissipate this impression.

(4) The Colegio also sponsors various publications. These include a law review, a monthly news letter and the miscellaneous reports of its various committees. Several resolutions and proceedings of the Board of Governor's and of the general assembly, of an ideological or political nature, have been published in the Colegio's law review, a publication which receives wide dissemination in and outside Puerto Rico. Additionally, the law review publishes some articles which can only be cataloged as political or ideological rhetoric, with little, if any, relationship to the workings of a law journal. The monthly news letter is also used to disseminate the resolutions of the Board of Governors, some of which as previously indicated, have a strong ideological or political content. The

program for the annual general assembly is also a source of publicity for ideologically-tainted resolutions, and is used as well for other proselytizing purposes.

Related to the above are the various committees and commissions of the Colegio. These groups issue reports on matters, including ideological and political issues, many of which have been the basis of the resolutions previously referred to herein. Many of these reports have been independently published by the Colegio, and their contents have received wide publicity and circulation throughout the Colegio membership and the general public.

(5) The Colegio has appeared either through testimony or by written briefs, before Congressional committees and before committees of the Legislature of Puerto Rico to present institutional views on behalf of the Colegio membership regarding pending legislation and other matters of a political and/or ideological nature. Examples of these activities include appearances before Congressional Committees considering legislation dealing with migrant farm workers, and similar appearances to oppose legislation to increase the number of District Judges in the United States District Court for Puerto Rico. Colegio President Tapia Flores also appeared in person before a committee of Congress considering the enactment of Spanish language legislation for the U.S. District Court in Puerto Rico. On a second occasion he appeared before a committee investigating Naval activites in Vieques. Colegio President Negron Garcia appeared before the Puerto Rico Legislature to condemn the Electoral Law of Puerto Rico, and to state the Colegio's position as to "what the electoral process in a democracy should be."

Schenider, 565 F. Supp. 963, 966-71.

(6) Although no evidence was presented by the Colegio regarding its non-ideological activities, we assume that these activities take place. There is, however, no way of deciding from the evidence before us the proportion of non-ideological

to ideological activities. Considering the testimony of the Colegio's auditor, Juan Espiet, to the effect that there is no way of determining, from an accounting standpoint, the extent of nonideological versus ideological activities, and further considering the pervasiveness of the latter, we are forced to conclude that the ideological activities of the Colegio constitute a large and inseparable proportion of the Colegio's total activities.

III. *The relevant constitutional principles*

A. The First Amendment Principles

The court turns therefore to its principal task: deciding precisely "the ambit of activities for which membership [in the Bar] may properly be compelled," *Romany*, 742 F.2d at 44; and attempting to ensure that dissenting members are not forced to support ideological activity outside that ambit, if the rule set forth in the Commonwealth Court's 1986 opinion does not already do so. The court wishes to emphasize that it cannot and does not express any opinion regarding the validity of the integrated bar, including the escrow/rebate scheme, under the Constitution of the Commonwealth of Puerto Rico. *See Cuesnongle* v. *Ramos*, No. 85-1068, slip op. at 16 n.6 (1st Cir., Dec. 30, 1987).

If there is any settled proposition in this area of the law, it is that a corollary of the First Amendment freedom of association is the right *not* to associate. *See, e.g., Abood* v. *Detroit Board of Education*, 431 U.S. 209, 234-36 (1977); *Chicago Teachers' Union* v. *Hudson*, 475 U.S. 292, 301 (1986). Compelling an individual to contribute to a particular association, through dues and membership therein, necessarily has an impact on that right. *See Hudson, supra*, at 301.

Whenever the interests protected by the First Amendment are infringed, the courts must strictly scrutinize that government action to determine if it advances a compelling state

interest. *See Elrod* v. *Burns*, 427 U.S. 347-362 (1976) (opinion of Brennan, J.) ("The interest advanced must be paramount, of vital importance . . ."); *Buckley* v. *Valeo*, 424 U.S. 1, 44-45 (1976) ("whether the governmental interests advanced in its support satisfy the exacting scrutiny applicable to limitations on core First Amendment rights of political expression"). Furthermore, the governmental compulsion must be "carefully tailored to minimize the infringement." *Hudson*, 475 U.S. at 303. In the words of the Supreme Court:

> The right to associate for expressive purposes is not, however, absolute. Infringements on that right may be justified by regulations adopted to serve compelling state interests, unrelated to the suppression of ideas, that cannot be achieved through means significantly less restrictive of associational freedoms.

Roberts v. *United States Jaycees*, 468 U.S. 609, 623 (1984).[5]

The Supreme Court has dealt with the problem of compelled association in the union context. *See Chicago Teachers' Union* v. *Hudson*, 475 U.S. 292 (1986); *Ellis* v. *Brotherhood of Railway Clerks*, 466 U.S. 435 (1984); *Abood* v. *Detroit Board of Education*, 431 U.S. 209 (1977); *Brotherhood of Railway Clerks* v. *Allen*, 373 U.S. 113 (1963); *International Ass'n of Machinists* v. *Street*, 367 U.S. 740 (1961); *Railway Employees Dept.* v. *Hanson*, 351 U.S. 225 (1956). The principles expressed in these cases are controlling here, although the differences between bar associations and unions preclude a purely mechanical application. Even extrapolating directly from

[5] Whatever confusion may have existed concerning the standard to be applied when an individual is compelled to pay dues to an association, *see* Sorenson, *The Integrated Bar and the Freedom of Nonassociation—Continuing Siege*, 63 Neb.L.Rev. 30, 62 (1983), was allayed by *Hudson's* direct reference to traditional First Amendment analysis. *See Hudson*, 475 U.S. at 303 n.11, 106 S.Ct. at 1074 n.11; *see also Gibson* v. *The Florida Bar*, 798 F.2d 1564, 1569 (11th Cir. 1986).

Lathrop v. *Donohue*, 367 U.S. 820 (1961), an early case dealing with the constitutionality of the integrated bar, is unlikely to prove very fruitful. *See Gibson* v. *The Florida Bar*, 798 F.2d 1564, 1566-67 (11th Cir. 1986); *see also Abood*, 431 U.S. at 233 n.29. Analysis of plaintiffs' claims therefore will require determining whether compulsory membership in the bar, with the present escrow/rebate system in place, is the least restrictive way to achieve Puerto Rico's compelling interests.

B. Application of the First Amendment to the Colegio

1. The Asserted State Interests

When announcing its new rule for dealing with dissenting attorney's fees, the Commonwealth court articulated several of the interests the integrated bar association is intended to further. Two were remarkably broad: "[t]he creation of a strongly pluralistic society . . .," 1986 Rule, Official Translation at 13 (quoting *Colegio de Abogados de Puerto Rico* v. *Schneider*, 112 D.P.R. 540, 549 (1982)) and "contributing to the betterment of the administration of justice." *Id.* at 18.

One can hardly conceive of loftier goals in a democratic society than creating a strongly pluralistic society and improving the administration of justice. And yet broad statements such as these cannot form the basis for an infringement of First Amendment rights. If used at all they must be narrowly tailored. The Eleventh Circuit, for example, has somewhat artificially narrowed this "amorphous" interest:

> The Bar should construe "improving the administration of justice" as pertaining to the role of the lawyer in the judicial system and in society. The collective expertise of lawyers is grounded in their long-standing relationship with the courts. Lobbying activities that infringe upon individual rights should relate directly to that expertise.

Gibson v. *The Florida Bar*, 798 F.2d 1564, 1569 (11th Cir. 1986). In a footnote it then gave examples of permissible lobbying subjects:

> Acceptable areas for Bar lobbying would include the following topics: (1) questions concerning the regulation of attorneys; (2) budget appropriations for the judiciary and legal aid; (3) proposed changes in litigation procedures; (4) regulation of attorneys' client trust accounts; and (5) law school and Bar admission standards.

Id. at 1569 n.4. In commenting on a similar statement of purpose advanced by the New Mexico Bar, the district court stated:

> The standard urged by the Bar is an all-encompassing exception to the rule of *Abood*. It is difficult to conceive of an issue presented to the New Mexico Legislature which cannot arguably be related to the administration of justice or improvement of the legal system. The standard is too broad.

Arrow v. *Dow*, 544 F. Supp. 458, 462 (D.N.M. 1982). If "the administration of Justice" is deemed too broad a standard, what can be said of the "advancement of a pluralistic society"? Accepting these standards as the guides to determine permissible bar activity would be tantamount to a complete abdication of the court's duty to protect dissenting attorneys' First Amendment rights.

Besides their inherent ambiguity, these government interests read too broadly suffer from an additional fundamental flaw: Compelling association to further these interests acts directly to compel the expression of sensitive beliefs. As several Justices of the Supreme Court of Michigan recognized,

> [e]ven if the specific legislative political goals can be justified as advancing the public interest or improving the administration of justice, compelled support and association to further these activities is not constitutionally acceptable. The "public interests" and the "advancement of jurisprudence" are not unitary concepts subject to a single interpretation. Disagreements regarding legislative or other policy choices arise not only because they result in differing practical effects on individuals, but more importantly because they reflect differing ideological approaches to the subject matter. Such ideological beliefs, and association to promote or oppose such beliefs lie at "the core of those activities protected by the First Amendment." *Elrod* v. *Burns*, 427 U.S. 347, 356, 96 S.Ct. 2673, 2681, 49 L.Ed.2d 547 (1976) (plurality opinion).

Falk v. *State Bar of Michigan*, 411 Mich. 63, 305 N.W.2d 201, 218 (1981) (Ryan, J., joined by Moody and Fitzgerald, J.J.), *dismissed after further fact finding*, 418 Mich. 270, 342 N.W.2d 504 (1983) (*per curiam*).

In other words, lawyers would be compelled to express their opinion (or, worse, represent someone else's opinion as their own) on matters in which differing opinions are the product of *ideology*.[6] *Abood* v. *Detroit Board of Education* seems to state that such compulsion cannot be required as a condition for employment. *See Abood*, 431 U.S. 209 at 235. *Roberts* v. *United States Jaycees* reinforces this conclusion when it states that an infringement of First Amendment rights can only be

[6] The very fact that differences of opinion stem from varying ideologies renders much less compelling the state's interest in getting an *attorney's* opinion, since it is less likely to be informed by his or her particular expertise as a lawyer than by his or her political ideological tendencies.

justified by a compelling state interest "unrelated to the suppression of ideas." *Roberts*, 468 U.S. at 623.[7]

For all of the above reasons, therefore, the court must search for narrower expressions of the state interest, when attempting to justify the burden that compulsory association places on dissenting attorneys' freedom of association.[8] It is worth noting that the Supreme Court, faced with the agency shop, reacted in a similar manner. The inquiry was not whether the payment of dues was narrowly tailored to advance "labor peace"; but rather whether it narrowly remedied the free rider problem—the threat to labor peace. As a consequence, the Supreme Court decided objectors should only pay for those activities that directly benefited them and contributed to collective bargaining and contract administration (which are the Union's core contributions to labor peace). *See Ellis*, 466 U.S. 435, 447-48.

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[7] One commentator has summed up all these objections as follows:

> [Advancing the administration of justice is too broad.] Too broad, I presume, in two senses. First, given *Abood's* applicability, any such standard must enable the bar and ultimately the courts to discriminate between valid and invalid uses of compulsory dues in order to safeguard the First Amendment rights of captive dues payers. But this standard is far too vague to serve as a basis for any such discrimination. Second, the standard's breadth suggests that there is a compelling state interest in having the bar lobby on virtually any bill it chooses, which seems preposterous. Lawyers' expertise is surely more modest than that and . . . bar position taking on some subjects germane to the administration of justice (e.g., no-fault auto insurance) may be so colored by lawyers' private interests as to have no distinctive, let alone compelling, public value.

Sorenson, *supra* n.4, at 61 (footnotes omitted).

[8] An additional reason for discarding these purposes may be pointed out: In light of the scope of the goal to be achieved (*e.g.*, a more pluralistic society) one may wonder if a compulsory bar association could ever be considered the means *least restrictive* of first amendment rights of reaching that ideal. Indeed, one may question whether compelling uniformity of expression is calculated to achieve a more pluralistic society at all.

2. The Permissible Purposes

Certain state purposes for the bar are clearly acceptable,[9] and attorney discipline is one of these. The Commonwealth clearly has an interest in ensuring that attorneys, as repositories of the public trust, and as officers of the court playing a crucial role in determining the guilt or innocence of its citizens, are held to the highest level of integrity. The interest takes on even greater weight when one considers that only lawyers can be notaries in Puerto Rico, and that as notaries they validate all sorts of public documents, acting essentially as public officers. *See Schneider*, 565 F. Supp. at 972 n.34.

Furthermore, bar-controlled discipline is clearly a narrowly tailored method of policing attorneys. Lawyers themselves, better than anyone, know the pressures created by the practice of law. They can anticipate problem areas and effectively provide safeguards. Attorneys are uniquely qualified to strike the delicate balance between zealous advocacy and respect for the judicial system. Finally, they are in a particularly favored position to police themselves. While some aspects of this self-regulatory function may be seen to have ideological overtones (note, for example, the debate concerning attorney advertising), the weight of the interest and the bar's particular ability to advance it outweigh the burden on dissenting attorneys.[10]

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[9] The conclusions the court sets forth in the following pages have been culled from the few cases on point, *see, e.g.*, *Gibson* v. *The Florida Bar*, 798 F.2d 1564, 1569-70 (11th Cir. 1986); *Arrow* v. *Dow*, 544 F. Supp. 458, 461-63 (D.N.M. 1982), and from the commentators, *see, e.g.*, Schneyer, *The Incoherence of the Unified Bar Concept: Generalizing from the Wisconsin Case*, 1983 A.B.F.Res.J. 1, *passim*; *Sorenson, The Integrated Bar and the Freedom of Nonassociation—Continuing Siege*, 63 Neb.L.Rev. 30, 63-80 (1983); *Note*, Falk v. State Bar of Michigan: *First Amendment Challenge to Bar Expenditures*, 3 Det.Col.L.Rev. 737, 747-50 (1982), as well as from the articulations of state interest set out by the Supreme Court of Puerto Rico, *see Colegio de Abogados*, 86 J.T.S. 60 (1986).

[10] One commentator, however, has suggested that if approximately 20 of 50 states manage equally well to perform all these functions by means of legislative regulation and judicial rule-making, without a compulsory bar association, then it cannot be said that an integrated bar is the least restrictive method of achieving *any* goals. *See* Sorenson, *supra*, at 69.

A similar compelling state interest is upholding the competence of its members of the profession. The importance of skilled, well-trained lawyers to ensure the evenhanded application of the laws is self-evident. The government may require the bar to assure that, through continuing legal education, bar admission standards, and the supervision of law schools, attorneys become and remain qualified to practice the law. Again, attorneys are singularly qualified and owe a certain duty to ascertain lawyers' most serious educational needs and the best ways to meet them.

A third constitutionally permissible end is increasing the availability of legal services to society. This includes traditional efforts like legal aid programs, public information regarding availability of legal services, and public education on substantive areas of law (*e.g.*, landlord-tenant law) that would increase citizens' ability to recognize and enforce their legal rights.[11] The reasons this can be seen as a compelling interest narrowly served by an integrated bar are similar to those described above: Lawyers' collective expertise places them in a special position to perform this function. Furthermore, their position in society, as a link between the written law and its living expression, imposes certain special duties on them to make legal services available to those for whom legislation would otherwise remain behind an impenetrable veil. Decisions regarding the course society ought to take lie in the political realm; once those decisions are incorporated into legislation, lawyers may be required to ensure that the law is explained to society's members.

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[11] This should not be read, of course, as a license to lobby for new consumer legislation, for example, but simply as the ability to inform people of the state of the law.

Finally, the special and intimate relationship between attorneys and the courts gives attorneys special knowledge in areas relating to the improvement of the functioning of the courts. *See Gibson* v. *The Florida Bar*, 798 F.2d at 1569. They include such subjects as evidentiary rules, rules of procedure, docketing matters, and similar methods of ensuring judicial efficacy and efficiency. Public commentary by the Bar Association on these subjects is not likely to seriously implicate attorneys' political beliefs. Furthermore, they are subjects that, because of their arcane nature, escape public scrutiny to a great degree, making commentary by the qualified segment of the public all the more vital.

There are some expenditures that are not challenged, and do not seem to present any First Amendment problems. We note, for example, that the Bar Association provides attorneys with life insurance. A fifth category, therefore, of permissible expenditures, are those with no expressive content, that convey no messages, and benefit all members equally. While not necessarily promoting a great public interest, these items do not act to infringe any real right to freedom of expression, and therefore need not be strictly scrutinized. *See Ellis* v. *Railway Clerks*, 466 U.S. 435, 456 (1981).

The Bar's publications, of course, may meet all or none of these purposes. In this case, the court has found that the Bar's various publications contain markedly ideological material. *See ante*, and *Schneider*, 565 F. Supp. 963, 969-70. As the Supreme Court has made clear, "[i]f the [Bar] cannot spend dissenters' funds for a particular activity, it has no justification for spending their funds for writing about that activity." *Ellis* v. *Railway Clerks*, 466 U.S. at 451. In view of the extent of political content in these magazines, and its intermingling with permissible content, the publications as they exist now cannot be funded by objecting attorneys. Furthermore, trying to separately account for the expense of each individual published item is the kind of burdensome nit-picking that itself

chills the exercise of First Amendment rights. Each publication stands or falls, therefore, as an indivisible entity, depending on its editorial policy. If a magazine, for example, is a free forum for the exposition of educational articles reflecting different viewpoints, it passes muster.

It is entirely possible that additional legitimate areas of concern for the Bar may exist or may develop. It is unfortunate that because plaintiffs' position is that no expenditures are permissible, and defendants' that all statutory purposes are permissible, the court has received no meaningful discussion of what means narrowly advance compelling state interests. This situation, as mentioned already, was aggravated by Colegio's insistence on procedural matters already repeatedly decided by this same court and its failure to supplement the record with any additional evidence from that previously presented.

IV. *The Constitutionality of the 1986 Rule*[12]

As the court has pointed out, *see Schneider* v. *Colegio de Abogados de Puerto Rico*, 565 F. Supp. 963 (D.P.R. 1983), and the parties have stipulated, the Colegio uses a substantial portion of its budget to subsidize ideological activities. These are activities, as we have seen, for which support cannot be compelled. What we must now ascertain, therefore, is whether appropriate steps have been taken to ensure that dissenting attorneys' funds are not being used to finance those activities. The procedure that purports to do this is the 1986

[12] Although federal courts will often abstain when faced with a challenge to a new rule that lacks definitive interpretation by a state's supreme court, *Railroad Comm'n.* v. *Pullman Co.*, 312 U.S. 496, there is no need to do so here. The 1986 Rule is facially invalid. No interpretation by a court could limit the plain language of the rule regarding the ambit of permissible activities: the rule simply allows the court or the legislature to add permissible activities at will. That very uncertainty is fatal to its validity. Furthermore, the procedures it sets forth by no means adequately protect the dissenters. Finally, the harm is ongoing, and will continue, under the terms of the 1986 Rule. *Pullman* type abstention, therefore, is not required.

Rule. *Schneider* v. *Colegio de Abogados*, 86 J.T.S. 10 (June 26, 1986). Whatever its value under the Constitution of Puerto Rico, however, it is clear that this remedy does not adequately safeguard dissenters' federal First Amendment rights.

As will be recalled, the rule defines "objectionable activities." It requires that 15% of annual dues be paid in to an escrow account for all those attorneys who enter general objections. It also provides that attorneys may object to specific activities, in which case it appears that the portion of their fees allocable to those activities will go into escrow. (While this last feature shows respect for members' feelings, it is clearly not compelled by the First Amendment, as the union shop cases make clear). At the end of the year, attorneys whose monies are in the escrow account can come forth and present, before a Review Board, their objection. Once the Review Board determines, under procedures yet to be set forth, which activities are objectionable and the costs allocable to them, a portion of the 15% would be returned to all objecting attorneys. This portion represents the proportion of their annual dues equal to the percentage of annual dues received by the Bar Association and spent on those objectionable activities.

Perhaps the most basic flaw in this arrangement lies buried in the rule's definition of "objectionable activities." The Commonwealth Court said: "Activities comprised within the Bar Association's purposes and ends which are germane thereto shall not be considered objectionable activities." 86 J.T.S. 10, Official Translation, at 17. A little later, the Court said:

> "The functions and purposes of the Bar Association are:
>
> To exercise other powers conferred by law or by the Supreme Court of Puerto Rico and any other incidental powers necessary or convenient for the ends of its creation and which are not in disagreement with the purpose and the law which creates the Bar Association."

Id. at 18.

It is obvious that the mere fact that an act lies within the statutory powers of a quasi-official organization does not permit the state to compel dissenters to fund that act. In fact, that was the very issue the United States Supreme Court avoided in *International Machinists* v. *Street*, 367 U.S. 740 (1961), by interpreting a statute not to permit certain challenged activities.[13] More importantly the Court explicitly held certain *statutory* purposes unconstitutional in *Abood* v. *Detroit Bd. of Education*, 431 U.S. 209 (1977). There the Michigan Supreme Court interpreted the relevant *statute* to permit unions to lobby the legislature on certain subjects. The Supreme Court of the United States nevertheless said that "[First Amendment principles] prohibit the appellees from requiring any of the appellants to contribute to the support of an ideological cause he may oppose as a condition of holding a job . . ." *Abood*.

To hold otherwise would be to permit the Commonwealth to determine, legislatively or by Court rule, the content of dissenters' First Amendment rights. The range of permissible compelled expression, as we have seen, must be determined by means of careful balancing of interests and rigorous constitutional analysis, not merely by deferring to legislative judgments. Therefore, since the remedy does not properly identify the activities which cannot be funded through compulsory fees, it fails to bring the integrated bar into conformity with the First Amendment.

The infirmities of the 1986 Rule do not end here, however. The procedure it sets out falls short of some of the requirements elucidated aleady by the Supreme Court in the union shop cases. The percentage of dues assigned to the escrow account has been set at 15% by the Commonwealth, with power in the Review Board to change that figure "within what is reasonable . . . according to the experience acquired." *Schneider*, 86 J.T.S. 60, Official Translation at 21. No

[13] An interpretation "not without its difficulties," *see Abood* v. *Detroit Bd. of Education*, 431 U.S. 209, 232(1977).

justification is given for the 15% figure nor are any procedures set forth to allow objection to it or review of a decision to change that figure."

The Supreme Court made the requirements in this respect crystal clear:

> [T]he "advance reduction of dues" was inadequate because it provided [objectors] with inadequate information about the bases for the proportionate share. . . . Basic considerations of fairness, as well as concern for the First Amendment rights at stake, also dictate that the potential objectors be given sufficient information to gauge the propriety of the union's fee. Leaving the nonunion employees in the dark about the source of the figure for the agency fee—and requiring them to object in order to receive information—does not adequately protect the careful distinctions drawn in *Abood*.

Chicago Teachers Union v. *Hudson*, 475 U.S. 292, 306 (1986) (footnote omitted).

In any given year, therefore, the percentage to go into escrow must be based on the Colegio's projected budget, and on its estimate of expenditures to be made for objectionable purposes. Furthermore, the United States Supreme Court requires that the organization justify the dues to be collected, not merely explain how the non-collected or escrowed fees will be spent. "An acknowledgement that nonmembers would not be required to pay any part of 5% of the Union's total annual expenditures was not an adequate disclosure of the reasons why they were required to pay their share of 95%". *Id.* at 307. In essence, the Colegio needs to make known to the members of the Bar—all of them—its proposed budget, allocating all the dues it intends to retain to one or other of the permissible ends set forth *ante*.

An additional reason to require *the organization* to explain

in advance what its expenditures will be, and which are permissible, can be found in *Abood*, 431 U.S. at 241: "[To do otherwise] would also place on each employee the considerable burden of monitoring all of the numerous and shifting expenditures made by the Union that are unrelated to its duties as exclusive bargaining representative." The solution, of course, is simply to categorize each expenditure in the budget under one of those heads, and use the percentage of expenditures not so allocated as the escrow percentage.[14] If it is impossible to do so in advance of the Colegio's fiscal year, the percentage can be determined by reference to average past budget items, with a view to reasonably expected changes in spending habits.

In this way, then, the Colegio will bear the initial burden of justifying all its expenditures, as required by *Hudson*, 475 U.S. at 307. In addition, dissenters must have a right to object to that allocation. The burden then remains on the Colegio to show before an "impartial decisonmaker" (who must render a "reasonably prompt decision") that the expenditure is germane to one of the permissible purposes. *Id.* at 307. That impartial body, of course, could be the one already in place by virtue of the 1986 Rule: The Review Board. The objectors' participation in this procedure, the provision of an impartial

[14] It is noteworthy that *Hudson* does not require "absolute precision" in this respect. *See Hudson*, 475 U.S. at 307 n.18. The Court recalls also that Colegio's auditor once testified that it was impossible to isolate ideological from other expenditures. *Schneider*, 565 F. Supp. 963, 971 (D.P.R. 1983). Apparently, however, the situation has changed:

> The Bar Association carries a strict bookkeeping of its income and expenses. It has a competent and responsible internal and external auditing system. It has devised a system by virtue of which it is possible to determine the direct and indirect cost of any activity in such a way that anybody can accurately say what contribution would correspond per bar member to a specific activity.

Schneider, 86 J.T.S. 60, Official Translation at 12. Therefore, it seems not unreasonable, indeed required in order to narrov ly tailor this scheme, to demand as much precision as is practically possible, so as to protect dissenters' First Amendment rights more adequately.

forum, and the allocation of the burden of proof to the Colegio are all necessary components of the escrow/rebate scheme.

One last item to be noted in this respect is the need for a "buffer." This is a certain percentage of the funds in addition to the unallocated percentage discussed above that should be escrowed in order to ensure that, if the impermissible expenditures exceed the amounts budgeted for them, the amount to be returned does not exceed the escrowed amount. (Compare *Hudson*, at 295. While the Supreme Court has not explicitly required such a buffer, this Court deems it necessary to keep the First Amendment infringement to a minimum. It need not be excessive, however, since the Colegio has a right also to use non-dissenters' fees in any way it chooses. *See Railway Clerks* v. *Allen*, 373 U.S. 113, 122 (1963); *Colegio de Abogados*, 86 J.T.S. 60, Official Translation at 1 (citing *Colegio de Abogados*, 112 D.P.R. 531 (1982)). The buffer will need to be larger, of course, if the pecentage escrowed is based on past budgets rather than the specific annual budget since the calculations will necessarily be more imprecise.

The buffer could be determined by reference to traditional levels of spending as reflected in past budgets, and traditional levels of overspending budgetary prognostications. Should improper expenditures still exceed the escrowed amount they should be returned with interest. While this would still work a temporary loan such as the court found impermissible in *Ellis* v. *Railway Clerks*, 466 U.S. 435, 443 (1984), it at least would be infrequent and inadvertent. It would satisfy, therefore, the "narrowly tailored" requirement.

As a separate matter, the 1986 Rule requires dissenting attorneys to object at the end of the year to specific activities they do not wish to fund. 1986 Rule, § C(2)(a), Official Translation at 21. The general objection filed initially acts merely as a "notice of the right to object," and no refund is made until the Review Board adjudicates the specific objections. 1986 Order, § C(3)(e), *id.* at 22-23. That, of course,

violates the specific mandate of *Abood*, 431 U.S. at 241: "To require greater specificity [in objecting] would confront an individual employee with the dilemma of relinquishing either his right to withhold his support of ideological causes to which he objects or his freedom to maintain his own beliefs without public disclosure" (footnote omitted). Once it is determined how much was spent for the activities forecast in the budget that do not come under one of the permissible headings, all those who made general objections should automatically be refunded the proper proportion of their funds.

One of plaintiffs' complaints is not only that they must make specific objections, but that these objections and their subsequent adjudication are to be made public. 1986 Rule, § B(9), C(3)(a) Official Translation at 20, 22. As is apparent from the earlier discussion, the determination that a certain activity has been deemed objectionable by the Colegio (or, after a challenge, by the Review Board) must be made known to all members of the Colegio. However, the identity of the dissenters and of those who challenge particular allocations in the budget must not be made public.

While the plaintiffs also argue that the neutrality of the Review Board is suspect, the court refuses to entertain this argument. The Review Board is composed of former members of the Supreme Court of Puerto Rico, and other ex-judges. Such a board meets the requirements of an "impartial decision-maker," at least facially until appropriate evidence is presented to the contrary.

Finally, the government collects the revenues from the judicial and notarial stamps and remits those revenues to the Bar Association without charging costs of administration and processing. Plaintiffs complain that their tax monies are in this way being used to support the Colegio. The 1986 Rule limiting expenditures of the stamp revenues to non-objectionable activities would adequately protect dissenters' right not to fund ideological activities.[15] If a

[15] As a practical matter, by simply substracting the dollar amount of stamp revenues from the *revenues* in the budget and an equal amount of *permissible* expenditures from the expenses side of the budget, before calculating the percentage of dues that must be refunded or escrowed, the Colegio can ensure that none of the stamp monies are spent on objectionable activities. We assume, of course, that objectionable activities can be funded *in toto* with the annual dues of non-objecting members, without making use of any income proceeding from dissenters' pockets, either through stamps or dues.

future rule is approved that complies with the principles stated so far, it would also include such a limitation, and stamp expenses would not pose a problem. If, on the other hand, no such rule is forthcoming, plaintiffs' position with respect to the tax monies spent on stamps will be radically altered. In this latter posture, as set forth below, plaintiffs would have no standing to challenge government spending to collect the stamp revenues.

Once the compulsory bar and stamp affixation schemes are held unconstitutional, they become essentially voluntary. Plaintiffs, as objectors, would presumably choose not to pay membership dues or purchase legal or notarial stamps. Once they make this choise, their only injury, and they admit as much in their post-trial memorandum, is the generalized injury suffered by all taxpayers a fraction of whose contributions are used to support this program. To claim relief, therefore, they must assert taxpayer standing.

These plaintiffs do not meet, however, any of the requisites for taxpayer standing. First, they challenge not a spending program, but the incidental expenses of regulating the Bar Association. *Compare*, *Flast* v. *Cohen*, 392 U.S. 83, 102-03 (1968) ("It will not be sufficient to allege an incidental expenditure of tax funds in the administration of an essentially regulatory statute.") Second, *United States* v. *Richardson*, 418 U.S. 166 (1974), and *Schlesinger* v. *Reservists' Committee to Stop the War*, 418 U.S. 208 (1974) "make it clear that a direct injury, and not merely a general interest common to all members of the public, is required for standing." C. Wright, *Law of Federal Courts*, 67 (4th Ed. 1983). Without further analysis, we conclude plaintiffs lack standing to challenge the use of tax money to collect and transfer to the Colegio the revenues from stamps.

A separate word is yet in order about stamp revenues, as opposed to the expenses incurred by the Secretary of the Treasury in collecting those revenues. The Bar Association argues that

the stamp issue is moot because of the Puerto Rico Court's earmarking of stamp proceeds. The Court also notes Colegio Resolution No. 1 (September 3, 1983), designating stamp proceeds to the purchase of attorney life insurance. Under the terms of this order, however, membership in the Bar becomes voluntary, and the Bar is under no *constitutional* compulsion to limit its activities in any way. No guarantee exists, therefore, that use of the stamp money will be curtailed to a particular kind of activity.

Faced with the same argument, the Supreme Court rejected it: "It is clear 'that voluntary cessation of allegedly illegal conduct does not moot a case.'" *Chicago Teachers Union* v. *Hudson*, 475 U.S. 292, 305 n.14 (1986) (quoting, *inter alia*, *United States* v. *Concentrated Phosphate Export Ass'n*, 393 U.S. 199, 203 (1968)). As here, the defendant in *Hudson* was "free to return to his old ways," and would otherwise be granted "a powerful weapon against public law enforcement." *Ibid.* The court is not convinced that the Colegio has "satisf[ied] the heavy burden of persuasion which [the Court has] held rests upon those [making this argument]. *United States* v. *Concentrated Phosphate Export Ass'n*, 393 U.S. at 203.

Furthermore, and more importantly, the dissenters will obviously choose not to remain members of the Bar. To force *them* to pay for part of the members' life insurance, for example, is just another way of compelling support for the Colegio's activities. Even though the specific activity for which the money is earmarked is innocous, the stamps would, in effect, be nothing but a levy imposed on dissenting attorneys for the benefit of those who choose to join the Colegio—now a voluntary association free to be political.

In addition, as long as the insurance benefits only members, earmarking those funds would be nothing more than the bookkeeping trick dismissed by the Supreme Court in *Abood* v. *Detroit Bd. of Education*, 431 U.S. 209, 237 n.35 (1977). Any funds from dissenters that relieved the members of even non-

political expenses would merely free up additional assets for use in ideological activities. This kind of support for the Colegio must, therefore, be enjoined, until adequate protection for objecting attorneys is put into place.

V. *Conclusion*

While all other aspects of the 1986 Rule appear to pass constitutional muster, it is apparent from the shortcomings just highlighted that the Rule fails to adequately protect dissenters' rights. In the absence of such protection, or until the Colegio ceases *all* ideological activities not germane to the purposes expressed in this opinion, compelled membership in the Colegio de Abogados is unconstitutional. Therefore, under the present circumstances, the Commonwealth cannot continue to make membership in the Bar, or its support, through the affixation of stamps, a precondition to the practice of law.

The court believes, however, that a remedy incorporating the features of the 1986 Rule not inconsistent with this opinion and additional safeguards in line with the principles expressed herein is feasible. The Court therefore will delay the entrance of judgment in this case for 60 days from the date of this order, to provide the Commonwealth with time to set in place such a remedial rule, if it so wishes. If the parties have not presented the court, before 60 days, with a scheme that meets the necessary requirements, the defendants will be prevented from imposing any negative consequences upon lawyers who fail to pay their dues or affix legal or notarial stamps to any legal document.

In conclusion the court finds that Sections 3, 4, 10 and 11 of Law 43, and such part of Section 6 of Law 99 as deals with the notarial stamp, as well as the analogous provisions of Section 38 of that law, and all of Law 115, as interpreted, enforced and applied, are in violation of the basic guarantees of freedom of expression and association embodied in the First

Amendment of the Constitution of the United States, and therefore contravene either the First or the Fourteenth Amenment to that Constitution.[18]

The plaintiffs also request an award of damages for past infringements of their rights. Since no additional evidence has been introduced, the court is forced to come to the same conclusion it reached in 1983:

> There is no question but that the Colegio's actions have caused these Plaintiffs damages and that the Colegio's bad faith qualifies these damages for recovery pursuant to 42 U.S.C. § 1983. The problem, however, lies with a determination as to the amount to which said Plaintiffs are entitled. The evidence is too vague for the Court to establish through anything other than speculation, the amount of damages suffered by these Plaintiffs. Such conjecture would be contrary to good legal practice and is thus rejected. In view thereof, Plaintiffs are awarded nominal damages in the amount of $1.00 each against the Colegio.

Schneider, 565 F. Supp. 963, 979.

In view of the findings and conclusions set forth above, it is hereby ORDERED, ADJUDGED AND DECREED, on a date 60 days from the date of this opinion, and unless the court at that time orders otherwise:

> (1) That Sections 3, 4, 10 and 11 of Law No. 43 of May 14, 1932, as amended, of the Commonwealth of Puerto Rico (4 L.P.R.A. 774, 775, 781, 783), as interpreted, enforced and applied are hereby declared to be violative of the First or Fourteenth Amendments to the Constitution of the United States;

[18] *See Examining Board* v. *Flores de Otero*, 426 U.S. 572, 96 S.Ct. 2264, 49 L.Ed.2d 65 (1976).

(2) That Section 6 of Law No. 99 of June 27, 1956 of the Commonwealth of Puerto Rico (4 L.P.R.A. 1006), commencing with that part of the second sentence of the section which reads "and a stamp to be adopted" and continuing through the end of said section, insofar as it deals with Bar Association stamps, as interpreted, enforced and applied is hereby declared to be violative of the First or Fourteenth Amendments to the Constitution of the United States;

(3) That Section 38 of Law No. 99 of June 27, 1956 of the Commonwealth of Puerto Rico (4 L.P.R.A. 1038), where it reads "as well as the proper bar stamps of the Bar Association of Puerto Rico," as interpreted, enforced and applied is hereby declared to be violative of the First or Fourteenth Amendments to the Constitution of the United States;

(4) That, as of the effective date of this order, and until such time as the Colegio de Abogados de Puerto Rico ceases to engage in ideological and/or political activism, or sets in place an adequate protective mechanism in compliance with the First Amendment principles explained herein, all Defendants, except the Justices of the Supreme Court of Puerto Rico (*see In re Justices of Supreme Court of Puerto Rico*, 695 F.2d 17, 23 (1st Cir. 1982)), their agents, employees, subordinates, and all persons over whom control may be exercised by said Defendants are hereby enjoined and prohibited forthwith from:

(a) Prosecuting, harassing or in any manner taking action against any person licensed to practice law, including notarial law, for failure to pay directly or indirectly any due or fee prescribed by any law, regulation, practice or custom of the Commonwealth of Puerto Rico or of the Colegio de Abogados de Puerto Rico, that is intended to fund the Colegio de Abogados;

(b) From denying full legal validity to any pleading, public instrument or deed by reason of the failure of any person to adhere thereto, and/or cancel therein, any forensic or notarial stamps; and

(c) From denying or affecting the right of any person, otherwise duly qualified to practice law and/or engage in notarial practice by reason of their failure to pay any due or fee to the Colegio de Abogados de Puerto Rico, or by reason of their non-membership in said organization, or by reason of the failure or refusal of said person to purchase and use, in the relevant pleading or public instrument, any forensic or notarial stamp.

(5) That the Colegio de Abogados de Puerto Rico pay the sum of one dollar ($1.00) each to:

(a) Robert E. Schneider
(b) Hector Ramos
(c) Oreste V. Ramos
(d) Jorge F. Romany
(e) Jorge Souss

IT IS SO ORDERED.

At San Juan, Puerto Rico, this March 3, 1988.

(s) JUAN R. TORRUELLA
JUAN R. TORRUELLA
U.S. Circuit Judge

APPENDIX A

Excerpt of Hearing Before Judge Torruella, July 8, 1987

THE COURT: Before you rest, I would like to say something for the record. I don't want any misunderstandings. I understand the record in this case to be the evidence that has been presented before the Court today and at the prior hearing. If it's not presented before this Court, it is not evidence unless I can take judicial notice, of course.

Secondly, there is a stipulation that has been referred to by

plaintiff that is in the record that reads, "The plaintiffs and the Colegio stipulate that activities similar in nature to those undertaken by the Colegio prior to 1983 have continued." That is evidence.

I would like also to state for the record that in my opnion—which should speak for itself, but I would like to be sure that there are no misunderstandings—I stated on page 97 of 575 Federal Supplement—

MR. ANDUZE: 575, your Honor?

THE COURT: Yes, 575 Federal Supplement, at page 97 I stated, "Furthermore, there is no way of determining from an accounting standpoint footnote 24, testimony of Juan [Espiet], Colegio auditor, the dollar amount of this support—" talking about the support for ideological activities "—except to conclude that from the pervasiveness, scope and breadth of this type of activity it's obvious that the backing has been and is considerable."

I would also like to state for the record—

MR. ANDUZE: Excuse me, your Honor. You were referring to footnote number what?

THE COURT: Twenty-four. The Court, without any analysis on my part, reads, "Furthermore, there is no way of determining from an accounting standpoint the dollar amount of their support except to conclude that from the pervasiveness, scope and breadth have this type of activity it's obvious that the backing has been and is considerable."

Furthermore, I would like to state for the record—well, what is in the record Colegio has never presented any evidence before this Court before or—at [least] up to now—concerning any other activities engaged in by the Colegio.

MR. ANDUZE: What do you mean by "any other activities"?

THE COURT: The record is—the only record that I have before me is the evidence that has been presented up to now. I have no way of making any findings as to anything except

what has been presented before me, at the last hearing and at this hearing.

MR. ANDUZE: Well, your Honor—

THE COURT: Let me finish.

MR. ANDUZE: I am sorry.

THE COURT: So I am asking you again if you—with what I have just stated if you have any other evidence to present to this Court?

MR. ANDUZE: Your Honer, the Colegio de Abogados has requested your Honor to take judicial notice of the June 26, 1986, opinion of the Supreme Court. In said opinion the Supreme Court makes an extensive analysis of the documentary evidence before that Court and before this Court. It makes an evaluation of the dollar amount of the activities that the Supreme Court found that may be ideological in nature or non-germane in nature, and the Supreme Court states very plainly that they are found to be [de minimus]. I agree with your Honor that even if they are [de minimus] they might be substantial.

THE COURT: Don't agree with me. I haven't said they were [de minimus]. As a matter of fact, I will also point out as part of my statement that the plaintiffs, as I understand at this stage of proceeding, are challenging the so-called remedy, they are challenging the validity of the 15 percent. As I read the cases—and this is also under issue—as I understand it, once there is a challenge made to that amount, the challenged party has the burden of proof of establishing before the challenged body, which is this one, the validity of that figure.

MR. ANDUZE: Well, your Honor, the problem is that you are [applying] to the this matter other cases that analyze a procedure that is being—that was followed or a system that was established by one of the litigant parties, and that was within the control of that litigant party.

THE COURT: Look, I understand your arguments on jurisdiction and all these other matters. I am stating for the

record the way I see the case right now, and I am giving you the opportunity at this time to add any other evidence you feel is relevant to the way you see the case. I may be wrong after I read your motions and so on and so forth. This may all be academic but I don't want you coming in later and claiming you were not given the opportunity.

MR. ANDUZE: Your Honor, I appreciate your comments most definitely, and that's why I am trying to present this to the Court, because maybe the Court will be able to eliminate me further as to any comments. Let—may I finish my statement, please?

THE COURT: Go ahead.

MR. ANDUZE: Sir, the reason I brought up the question of the procedure followed by the Supreme Court is that in the cases concerning the unions and the so-called free riders on all those cases that have to do within the context of union fees and dues, it was the union who was the party empowered and were controlled to establish the procedure.

Therefore, the Court can come and say, "you have the burden of showing this and this and that," but in this case the procedure, the remedy and the percentages and everything that is established is not established by the Colegio de Abogados. I cannot even if I show you 20 percent, 10 percent, 12 percent. It would be immaterial because it would not be within the realm of possibility for Colegio to change what the Supreme Court of Puerto Rico has established to be the remedy. We are in a different footing as to that possibility to a union, to a teachers association, to an air stewardess association, any of the other cases, railway employees, that are the groups that have been analyzed by the cases concerning the establishment of the remedy.

THE COURT: Maybe not all those cases are applicable to this situation. Maybe this is something altogether different..

MR. ANDUZE: Well, I think that they are guidelines as to the rights of the [dissenters], but the reality of the operational

aspect of establishment of the remedy, I believe this is very much different because it is within the Supreme Court's judicial power and as exercised in the two opinions issued by the Court concerning the establishment of that remedy.

So what Mr. Schneider wants me to show is something that has no bearing as to this Court's decision, even if it had jurisdiction, even if it found that there was a case on controversy that the Court may decide. So that's why I understand it to be very important to make that distinction to the Court that we are not in the same sutuation or same position as a union or a trade association with the power to amend or change or establish a remedy on our own volition.

THE COURT: Well, there is something else that I neglected to state. In view of the stipulation that has been entered into by the parties I don't know that it's necessary that I admit into evidence any of those documents that you brought today. After I issued the order I read the file, and I thought that maybe I shouldn't have issued the order.

MR. ANDUZE: Well, your Honor, the stipulation says what is a fact of life, the Colegio de Abogados has continued to conduct activities, continued to publish a law review, has continued to have activities in those regards, it has continued to do activities similar.

THE COURT: Well, the only reason—

MR. ANDUZE: Similar activities from 198[3].

THE COURT: The only reason I issued my order was to give you the opportunity to bring up to date the findings of the prior opinion. Now, there is no reason to clog up the records with a whole bunch of papers in view of that stipulation. I am telling you that I am not going to then require the submission of these documents because it's unnecessary in view of the stipulation.

MR. ANDUZE: Well, your Honor, the stipulation has said—

THE COURT: Whatever it says is in the record. All right, in view of what I said, are you going to offer any evidence?

MR. ANDUZE: No, your Honor.

THE COURT: All right, thank you. Other defendants?

MR. VAN DERDYS: No, your Honor. [We] join the position expressed by Brother Counsel Anduze.

THE COURT: All right.

APPENDIX D

§ 3343. Destruction of presumptions; res judicata

Presumptions established by law may be destroyed by proof to the contrary, except in the cases in which it is expressly prohibited.

Only a judgment obtained in a suit for revision shall be effective against the presumption of the truth of the res adjudicata.

In order that the presumption of the res adjudicata may be valid in another suit, it is necessary that, between the case decided by the sentence and that in which the same is invoked, there be the most perfect identity between the things, causes, and persons of the litigants, and their capacity as such.

In questions relating to the civil status or persons, and in those regarding the validity or nullity of testamentary provisions, the presumption of the res adjuducata shall be valid against third persons, even if they should not have litigated.

It is understood that there is identity of persons whenever the litigants of the second suit are legal representatives of those who litigated in the preceding suit, or when they are jointly bound with them or by the relations established by the indivisibility of presentations among those having a right to demand them, or the obligation to satisfy the same. —Civil Code, 1930, § 1204.

APPENDIX E

IN THE SUPREME COURT OF PUERTO RICO

No. 0-77-431 Complaint

BAR ASSOCIATION OF PUERTO RICO,
PETITIONER,

v.

ROBERT E. SCHNEIDER, *et al.*,
RESPONDENTS.

JUDGMENT

San Juan, Puerto Rico, April 5, 1982

In view of the reasons set forth in the foregoing opinion, we hold that Act No. 43 requiring compulsory membership in the Bar Association of Puerto Rico is constitutional; that persons who are not members of the Bar Association of Puerto Rico may not practice law in this jurisdiction; that the obligation to pay the corresponding dues is also valid; that the Bar Association as well as its members, enjoy the right to freedom of speech; that attorneys who dissent from the activities or pronouncements of the Bar Association also have, under the Constitution of Puerto Rico, the right to object to the use of their contributions or part of them for ideological activities they do not approve; and that the Bar Association must devise a method within the parameters fixed in the fifth and last section of this opinion, in order to enforce the right of dissenting members.

It was so decreed and ordered by the Court and certified by the Chief Clerk. Mr. Justice Negron Garcia issued a concurrent opinion.

(s) LADY ALFONSO DE CUMPIANO
Chief Clerk

LRC/hvp

IN THE SUPREME COUR[T] OF PUERTO RICO

No. 0-77-431 Complaint

BAR ASSOCIATION OF PUERTO RICO,
PETITIONER,

v.

ROBERT E. SCHNEIDER, *et al.*,
RESPONDENTS.

RESOLUTION

San Juan, Puerto Rico, May 6, 1982

The Court is hereby informed of petitioner's Informative Motion of April 13, 1982. The Court retains jurisdiction to take cognizance of any issue regarding the fifth and last part of our judgment of April 5, 1982, and also to approve, disapprove or finally modify the remedy that shall be drawn.

It was so agreed by the Court and certified by the Chief Clerk.

(s) LADY ALFONSO DE CUMPIANO
Chief Clerk

IN THE SUPREME COURT OF PUERTO RICO

No. 0-77-431 Complaint

BAR ASSOCIATION OF PUERTO RICO,
PETITIONER,

v.

ROBERT E. SCHNEIDER, *et al.*,
RESPONDENTS.

RESOLUTION

San Juan, Puerto Rico, June 3, 1982

The Court is hereby informed of the motion filed on May 10, 1982 by the petitioners and of the fact that the resondents, attorneys Robert E. Schneider and Hector Ramos Diaz, have not paid their Bar Association dues.

On April 5, 1982, this Court held that while the remedy mentioned in the opinion is being implemented "the resondents shall pay the amounts due to the Bar Association within fifteen days from service of notice of this opinion. If they fail to do so, they shall be suspended from the practice of law in Puerto Rico from the date said term expires until the moment they pay the above-mentioned debts".

Through motion for reconsideration filed on April 20, 1982, respondents, attorneys Robert E. Schneider and Hector Ramos Diaz, had the opportunity to state their points of view on the aforementioned opinion. Said motion for reconsideration was denied on May 6, 1982 and was duly notified. The judgment of this Court is now final and unappealable.

In view of the foregoing, attorneys Robert E. Schneider and Hector Ramos Diaz are suspended from the practice of law, as well as from the notarial practice until they pay the sums owed to the Bar Association. Notice should be served on the department of State, on the office of Courts Administration and on the Puerto Rico Bar Association.

It was so agreed by the Court and certified by the Clerk. Mr. Justice Torres Rigual took no part in this decision.

(s) LADY ALFONSO DE CUMPIANO
Chief Clerk

OLD/ba

(Translation)

IN THE SUPREME COURT OF PUERTO RICO

No. 0-77-431

BAR ASSOCIATION OF PUERTO RICO,
PETITIONER
v.
ROBERT E. SCHNEIDER *et al.*,
RESPONDENTS.

COMPLAINT

MR. CHIEF JUSTICE TRIAS MONGE delivered the opinion of the Court.

San Juan, Puerto Rico, April 5, 1982

The Bar Association of Puerto Rico filed a complaint before this Court against ninety-nine attorneys who had not paid the annual dues established according to law. We issued an order to show cause why the respondents should not be separated from the practice of law.

Most of the respondents paid the amounts owed. Two of them, Atty. Robert E. Schneider and Atty. Hector Ricardo Ramos Diaz, contend that the order issued by this Court is at variance with the Constitution of the Commonwealth of Puerto Rico. They requested time to substantiate their allegations. We granted the term.

Respondents' contentions boil down to the following:

(1) that the Legislature lacks the power to regulate the practice of law, inasmuch as this power is within the province of the Supreme Court of Puerto Rico;

(2) that they cannot be forced to become members of the Bar;

(3) that the provisions of Act No. 43 of May 14, 1932 (4 L.P.R.A. § 771 *et seq.*), establishing the payment of dues, is void because it violates the freedoms of speech and association; and

(4) that the amounts collected by virtue of the dues required as a condition to practice the legal profession, as well as those received from the compulsory purchase of notarial and bar stamps, are impermissibly used for purposes foreign to the Bar's duties.

We appointed a Special Master to receive whatever evidence the parties might wish to present. The Special Master rendered his report on September 9, 1980. He included a stipulation of the parties regarding the matters involved, as well as the evidence presented. The respondents do not point out which are specifically the Bar's activities they object to. After the corresponding briefs were filed, the case was taken under advisement in March 1981.

Let us now examine the many issues raised in this case.

1. *Structure and Regulation of the Practice of Law in Puerto Rico.*

The Bar Association of Puerto Rico was founded on June 27, 1840, through a Royal Decree of May 5, 1838, and the Royal Order of December 31, 1839. Todd, *Datos Historicos del Ilustre Colegio de Abogados de Puerto Rico*, I-1 Rev. C. Abo. P.R. 81 (1935). In Spain, the Bar was known long before. The Madrid Bar, for example, was founded in 1596, and on November 23, 1617, by decree it was established that no attorney could practice law in Madrid unless he was a member of the Bar. Del Toro, *Un Siglo de Vida*, V-1 Rev. C. Abo. P. R. 20, 21 (1940). The origin of compulsory membership of the Bar in Barcelona dates back to an earlier period. Letter of King Martin of April 22, 1399, whose text is reproduced in A. Garcia-Gallo, II *Manual de Historia del Derecho Espanol* 145 *et seq.*, 3rd rev. ed., Madrid.

The Royal Decree of May 5, 1838, according to which were established the Bar Association of Puerto Rico and many others in Spain and its territories, also required that any per-

son interested in the practice of law in the region concerned had to become a member of the corresponding Bar. The Board of Governors determined the admission of the applicants, subject to review by a competent court. The bar itself in a general assembly, fixed the budget of expenses for each year and determined the amount each member had to pay. The Board of Governors also had ample disciplinary powers, subject to judicial review. For the text of the Royal Decree, see: II *Biblioteca de Ultramar*, 231 *et seq.*, Madrid, Imp. de Alegria y Charlain (1844).

Compulsory membership existed in Puerto Rico until it was suppressed by General John R. Brooke during the United States Military Government on the Island. U.S. Department of War, *General Orders and Circulars, 1898-1900*, G.O. 20 of December 3, 1898. Instead of the Bar Association of Puerto Rico, it established a colorless entity, which was voluntary and which led a precarious life until the present Bar Association was created by Act No. 43 of May 14, 1932 (4 L.P.R.A. § 771 *et seq.)*.

The Bar constituted by Act No. 43 was declared successor of the two juridical entities that preceded it. Its creation was conditioned to having a majority of the persons entitled to practice law before the Supreme Court of Puerto Rico accept it in a referendum.

Act No. 43, which was endorsed in the referendum, impose on the Bar Association the following obligations, among others: "to cooperate in the improvement of the administration of justice," "to render such reports and give such advice as the Government may require of it," "to defend the rights and immunities of lawyers," and "to maintain healthy and strict professional morals among the members." 4 L.P.R.A. § 772. Among its powers, we find those of adopting, with the approval of the Supreme Court, the canons of professional ethics that shall govern the conduct of lawyers; to institute disbarment proceedings before this Court; to create mutual-aid

funds, insurance systems and special funds; to organize a foundation to "implement its programs of service to the community and the profession"; and "to exercise such incidental powers... as may be necessary or advisable to the end of creating the Bar Association." 4 L.P.R.A. § 773.

Article 3 of the Act, 4 L.P.R.A. § 774, provides that "no person who is not a member thereof [of the Bar] shall practice law in this Commonwealth." Article 9 authorizes the Bar Association to fix the annual dues to be paid by its members, which shall be approved by a majority of the members present at a general assembly of the institution. 4 L.P.R.A. § 780. Article 10 provides that "Any member who fails to pay his dues, though otherwise qualified as a member of the Association, shall be suspended as such member, but may be reinstated on payment of his debt on this account." 4 L.P.R.A. § 781.

The Bar Association's funds come mainly from the above-mentioned annual dues, from the Bar stamp every lawyer must affix to the initial document he files in any judicial proceeding. 4 L.P.R.A. § 783, and of the proceeds of the notarial and other stamps adopted by the Bar Association according to the Act. See Act No. 115 of May 6, 941 (4 L.P.R.A. § 785).

[1-4] Respondents' argument that the Legislature of Puerto Rico lacks the power to order the integration of our Bar, as it did in 1932, lacks merit. As we have mentioned many times, it is true that admission to the practice of law is a function inherent to this Court, and that the legislation approved on this matter—such as Act No. 43—"is only advisory, not binding, on us." *In re Bosch*, 65 P.R.R. 232, 234 (1945); *Guerrero* v. *Court of Tax Appeals*, 60 P.R.R. 236 (1942); *Ex parte Jimenez*, 55 P.R.R. 51 (1939); *In re Rodriguez Torres*, 106 D.P.R. 698, 749-50 (Mr. Justice Negron Garcia, dissenting on other grounds); Arroyo, *Facultad de la Rama Judicial para Reglamentar la Profesion Legal*, 20 Rev. Jur. U.P.R. 38 (1950). Preeminence of the judicial action in this field—which

naturally includes the power to pass on whether or not a bar in a jurisdiction must be unified and under what conditions—does not mean that the legislation on these matters, which is not in conflict with the rules established by this Court, is void. Act No. 43 is perfectly valid when it establishes compulsory membership of the Bar in Puerto Rico.

[5] Act No. 43 meets a legitimate public purpose. It revived one of our most ancient and respected institutions, which has an unquestionable value not only for the benefit of the strict interest of a class, but also for the good operation of justice in our country and the social advancement of the community. Institutions such as the Bar Association—the Legislature has extended the compulsory membership to many other groups—fulfill a very special mission in our society. Contrary to the strongly pluralistic character of North American society, our milieu has traditionally been monolithic, lacking the many independent voices that make such great contributions to the health of the democratic way of life.

In different parts of the United States the concept of integration of the bar has had a history different from ours.[1] The concept began to spread in the twentieth century, but from 1921 until this action was instituted, thirty-two states, together with the Virgin Islands and the District of Columbia, have unified their bars and required compulsory affiliation. Reynolds, *Compulsory Bar Dues in Montana: Two (and a Half) Challenges*, 39 Mont. L. Rev. 268, 290 *et seq.* (1978).

In many cases, the integration has been carried out by legislative action, and in others by rulings of the higher state court either through an expressly conferred power or in the exercise of its inherent power. For examples of this last modality see: *In re Integration of the Bar*, 432 P.2d 887, 888 (1967);

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[1] The idea was originally proposed by Herbert H. Harley, founder of the American Judicature Society, who found his primary support in the English and Canadian experience. North Dakota was the first state to unify its bar (1921). J. Parness, *Citations and Bibliography on the United Bar in the United States*, American Judicature Society Report, Chicago, 1973.

Application of the President of the Mont. Bar Ass'n, 518 P.2d 32 (1974); *Petition of Rhode Island Bar Ass'n*, 306 A.2d 199 (1973); *Petition of Tennessee Bar Ass'n*, 532 S.W.2d 224, 229 (1975); *In re Washington Statm Bar Ass'n*, 493 P.2d 1237 (1972); Jeffers, *Government of the Legal Profession: An Inherent Power Approach*, 9 St. Mary's L. J. 385 (1978).

[6] The courts' inherent power in this field is so great that, even in the presence of a statute expressly prohibiting compulsory membership the judicial power has been exercised to provide exactly the contrary. *In re Integration of State Bar of Oklahoma*, 95 P.2d 113 (1939). See: *Petition of Tennessee Bar Ass'n*, *supra*. Statutes ordering that membership dues be included in the general state funds, subject to specific appropriation by the Legislative Assembly, were declared null. *Sharood* v. *Hatfield*, 210 N.W.2d 275 (1973).

We find no grounds whatsoever to deny the Legislature the power to revive the ancient Bar Association of Puerto Rico, founded so many years ago.

2. *Constitutionality of Compulsory Membership.*

We shall only consider in this section the problem of the constitutionality of compulsory membership. For the time being we shall make no reference to the relationship between the use given to the compulsory dues and the freedom of speech.

[7] The compulsory membership of lawyers, either through parliamentary or court action, has ample constitutional grounds. The same happens with the imposition of dues. The power of *raison d'etat*, in the case of legislative assemblies, and the courts' inherent power within our juridical system to look for the welfare of justice, have offered an ample basis to justify the unification of the bar and the adoption of measures for the support of the resulting institution. No citation has been brought to our attention, nor have we found any decision invaildating the concept of compulsory membership.

On the contrary, there are many North American cases rejecting the contention—made herein—that an attorney cannot be forced to become a member of a professional association whose purposes he opposes. See: *In re Scott*, 292 P. 291 (1930); *Kelley* v. *State Bar of Oklahoma*, 298 P. 623 (1931); *Application of the President of the Mont. Bar Ass'n, supra.* In *Lathrop* v. *Dohohue*, 367 U.S. 820 (1961), the United States Supreme Court upheld the constitutionality of the plan for the integration of the Wisconsin Bar.

The singular socio-political circumstances of Puerto Rico which we have already mentioned buttress even more the constitutionality of Act No. 43. The public interest in the creation of a strongly pluralistic society, in furtherance of the practice of law and of the good operation of the judicial system, outweighs the personal inconveniences that compulsory membership might entail. The right not to assemble, which can be derived from the opposite right consecrated in the Constitution of the Commonwealth, Art. II, Sec. 6, gives in before the above-mentioned interests, of such a clearly urgent nature under the Puerto Rican constitution. On different occasions we have examined this legislation and have accepted it as "satisfactory legislation to aid this court in regulating admissions to the bar and the conduct of its members" and we have expressly decided that "in order to utilize the privilege which we grant a lawyer to practice in our courts he must . . . be enrolled in the Association...." *In re Bosch*, 65 P.R.R. 232, 235 (1945). In *Bar Ass'n* v. *Fajardo*, 51 P.R.R. 512 (1937), several lawyers who had failed to pay their dues were suspended until payment thereof.

[8-9] We decide that the Constitution of the Commonwealth, in force since 1952, does not affect the principle embodied in art. 3 of Act No. 43 (4 L.P.R.A. § 774) to the effect that no person shall practice law in this jurisdiction if he is not a member of the Bar Association of Puerto Rico. The obligation to pay the corresponding dues is also constitutional. *Bosch* and *Fajardo* are unchanged with regard to the subject

under discussion herein. Up to this point, we have analyzed the validity of compulsory membership or of compulsory payment of dues and cancellation of stamps. Further on, we shall examine the use to which such funds are destined.

Before delving into this distinction, we should pronounce ourselves on the constitutional scope of action of the Bar Association of Puerto Rico.

3. *The Bar Association's Scope of Action.*

We examine this question only in order to adequately frame the problem that we will discuss later on: whether or not a member has the right to object to the use given to the funds he personally contributes. As it appears from the briefs, there is some confusion as to what the Bar Association may or may not do, and as to the relation between this matter and the right to raise objection against the use of funds for a specific purpose. Since the record is short of information with regard to this point, we will limit ourselves to state the general principles governing this field, without attempting to define the complete scope of the Puerto Rican Bar Association's right to freedom of speech.

We must, first of all, point out that the historical role of many of the ancient Bar Associations that influenced the development of others within the civil law tradition, was not that of being mere guilds immersed in the defense of their class interests. On the contrary, in France, whose experience echoed in many other countries, the Bar's role was, from time immemorial, a primarily political one. The Bar took active part in the country's principal political movements, both before and after the Revolution. It was suppressed on August 17, 1789, and gained new life in 1804. A. Young, *A Historical Sketch of the French Bar*, Edinburgh, 1869. Se: G. Massonies *La Jurisdiction du Barreau*, Paris (1912); J. Gueydan, *Les avocats, les defenseurs et les avoues de l'Union Francaise*, Paris

(1954). Spanish Bars were suppressed on several occasions by governments that were against the liberties they professed. During the early nineteenth century, each time an absolutist government was restored, compulsory membership to the bar was generally suppressed. VII *Enciclopedia Juridica Espanola* 71, Ed. Seix, Barcelona, n.d.

[10-12] Under our judicial system, it is evident that the Bar Association of Puerto Rico may engage in any activity authorized by the Legislature of Puerto Rico or by this Court, provided such activity is rationally linked to the purposes expressed in Act No. 43 or in the order this Court shall issue on its day, if it so determines on petition of party or on its own motion. Furthermore, the Bar Association enjoys, as an artificial person, ample freedom of speech under the provisions of Art. II, Sec. 4 of the Constitution; this freedom is at least as ample as that allowed in *First National Bank of Boston* v. *Bellotti*, 435 U.S. 765 (1978). In the case of Puerto Rico the Bar Association need not be a quiet and blushing entity, afraid to use the voice granted to it by the very pluralistic purpose it should serve, although such is not its only *raison d'etre*. In *Bellotti*, the Court said at 784:

> We thus find no support in the First or Fourteenth Amendment, or in the decisions of this Court, for the proposition that speech that otherwise would be within the protection of the First Amendment loses that protection simply because its source is a corporation that cannot prove, to the satisfaction of a court, a material effect on its business or property.

The freedom of speech of the Bar Association, in representation of the majority of its members, cannot be curtailed by dissident members. See: *Buckley* v. *Valeo*, 424 U.S. 1 (1976). They enjoy their own freedom of speech. The nexus between the latter's freedom of speech and the way of using certain

funds of the Bar constitutes a separate problem. We shall discuss it in the next section.

4. *The Bar Association's Use of Compulsory Contributions.*

The first thing to settle with regard to this issue is whether the record of this case adequately raised the constitutional problem of the relationship between a dissident member's freedom of speech, and the use of his contributions for purposes he does not share.

The record does not show the specific activities the respondents object to, nor that part of their contributions which are devoted to the same. We deem, however, that these deficiencies do not relieve us from going into the constitutional problem.

This has been the conclusion reached by the United States Supreme Court in similar cases. In *Lathrop* v. *Donohue*, *supra*, which case dealt with compulsory membership of lawyers and the imposition of dues to support the resulting institution, five justices deemed, despite the terse record before them, that the constitutional problem should not be sidestepped, although they differed as to the solution. To this effect see the reference to *Lathrop* in *Abood* v. *Detroit Board of Education*, 431 U.S. 209, 233 (1977). See also: *International Association of Machinists* v. *Street*, 367 U.S. 740 (1961); *Brotherhood of Railway and Steamship Clerks* v. *Allen*, 373 U.S. 113 (1963); *Railway Employers' Dept.* v. *Hanson*, 351 U.S. 225 (1956). In *Allen*, the following general allegation was deemed to be sufficient:

> [Sums] exacted under the Agreement "have been and are and will be regularly and continually used by the

> defendant Unions to carry on, finance and pay for political activities directly at cross-purposes with the free will and choice of the plaintiffs. At 118.

The allegations of the dissident members in this case are sufficient to raise the constitutional issue.

Lathrop has been cited as authority for the proposed rule that a dissident's freedom of speech does not affect the Bar Association's use of the funds such person has contributed. *Lathrop* constituted an authority for the constitutionality of compulsory membership, but the plurality of justices who subscribed the opinion of the Court refused to make a pronouncement on the constitutional issue before us regarding freedom of speech. 367 U.S. 830, 845. The interpretation in *Lathrop* is affirmed in *Abood*, *supra* at 848.

In *Abood*, however, the United States Supreme Court directly addressed the problem now before us. In that case, the appellants were government employees who refused to pay dues to a union they had to contribute to under an agency shop clause, although they objected collective bargaining in the public sector and the union's use of substantial amounts to support political issues. In *Abood*, the Court held that the above-mentioned clause of the agreement did not violate the freedom of speech guaranteed by the First and Fourteenth Amendments, nor the right to assemble, as long as the dues were used for labor purposes. If the funds were used for political or other ideological purposes, the Court determined that the Union was entitled to use the fund therefor, but that it could not constitutionally employ the funds of such persons who did not agree with such uses.

The rule laid down in *Abood* cannot be limited to the labor situation that the Court had before its consideration. The rule is wider and affects the very definition of the scope of the First Amendment to the Constitution of the United States. L. Tribe, *Constitutional Law* 589-90, 899, The Foundation Press, Inc. (1978). Although the United States Supreme Court has not made a direct pronouncement on the matter, several commentators have mentioned the connection between *Abood*

and the use of compulsory dues paid by dissident members of integrated bars for certain purposes. Parker, *First Amndment Proscriptions on the Integrated Bar: Lathrop v. Donohue Re-examined*, 22 Ariz. L. Rev. 939 (1980), Reynolds, *Compulsory Bar Dues in Montana: Two (and a Half) Challenges, supra;* Kamenshina, *The First Amendment's Implied Political Establishment Clause*, 67 Cal. L. Rev. 1104 (1979).

[13-15] *Abood* means that the freedom to contribute to political causes implies the freedom of not contributing. When we transcend the frontier of the activities most intimately linked with the practice of law and the administration of justice, we enter a zone of freedom of conscience where the weight of the interests involved undergoes a radical change. Consequently, we decide that the sense of the freedom of speech clause contained in Art. II, Sec. 4 of the Constitution of Puerto Rico is not narrower than that given by the United States Supreme Court to the First Amendment in this context. Compulsory membership is constitutional. Compulsory dues, established by the majority of the members as a condition to practice law in Puerto Rico, is also constitutional. In addition to this, the Bar Association may constitutionally pronounce itself on ideological matters. On the other hand, lawyers who dissent from such pronouncements—and not those who object to the Bar Association's performance of its statutory purposes or of those imposed by this Court—enjoy, under the Constitution of Puerto Rico, the right to raise objection to the use of their contributions or of part thereof for ideological activities they do disapprove. Such disapproval may be of a general nature, as it was expressed in *Allen* and in *Abood*.

The recognition of a dissident member's freedom of speech is not sufficient to settle the controversy before us. We must still formulate the adequate remedy within the circumstances involved, to enforce said right.

5. *The Remedy.*

Street, *Allen*, and *Abood* lay down some general guidelines for designing the proper remedy, but make no definitive pronouncement on this prickly problem.

[16] The record in this case, which allows for the discussion of the constitutional issues we have examined, but which hampers the drafting of a remedy, moves us to fix a procedure to facilitate and promote, within certain parameters, the formulation of a rule by the very Bar Association, as it happened in *Abood* at the initiative of the union concerned. To such effect we would provide:

> a) The Bar Association, not later than the date set for collecting the next annual dues and after giving the members an opportunity to express themselves on the matter, shall devise a method to ascertain that contributions of a dissenting member shall not be used for ideological purposes.
>
> b) The method will require that all objections of this nature be affirmatively expressed on the date of payment of dues. Absence of timely objection shall be taken as an authorization to the Bar Association to use the contributions for that year according to the general budget.
>
> c) The method shall duly follow the principles laid down in *Street*, *Allen* and *Abood*.
>
> d) The method shall include the member's selection of a Board composed of renowned attorneys who, among other functions, pass on, subject to review by this Court, the classification of the activities of the Bar Association, the proportion between the ordinary activities and the ideological ones, the validity of the objections a member may raise against certain activities, and over any other controversy arising from the remedy and its application.
>
> e) The method shall attempt to strike a proper balance

between the dissident members' freedom of speech and the need, so fundamental in Puerto Rico, to keep a strong Bar Association, loyal to its tradition and historical functions, and financially sound.

f) The method shall not allow any member to violate art. 10 of Act No. 43 (4 L.P.R.A. § 781), or other statutory provisions related to the organization and operation of the Bar Association. Any member, whether or not legitimately dissenting from the use of his contributions or of part of them for ideological purposes, shall pay on the dates fixed, the contributions required by the law or that this Court may timely authorize. Such payment shall in no way affect their right to the remedy that shall be established pursuant to our present opinion.

g) Until the above-mentioned remedy is implemented, the respondents shall pay the amounts due to the Bar Association within fifteen days from service of notice of this opinion. If they fail to do so, they shall be suspended from the practice of law in Puerto Rico from the date said term expires until the moment they pay the above-mentioned debts.

h) On the other hand, bearing in mind the respondents' freedom of speech, the Bar Association shall —until the remedy is implemented— deposit in a separate account an amount equivalent to the proportion between the sums destined to ideological purposes —as the term may be temporarily understood by the Board of Governors—and the total expenses of the Bar Association. A similar sum shall be added to the first one, which sum shall be taken from the contributions made according to law by non-dissenting members, and the resulting amount shall be used exclusively for the ordinary endeavors of the Bar Association. In this way we shall prevent that the respondents' contributions to the Association's ordinary expenses be disproportionate.

Judgment shall be rendered accordingly.

Mr. Justice Negron Garcia issued a concurring opinion.

IN THE SUPREME COURT OF PUERTO RICO

No. 0-77-431

BAR ASSOCIATION OF PUERTO RICO,
PETITIONER
v.
ROBERT E. SCHNEIDER ET AL.,
RESPONDENTS

COMPLAINT

MR. JUSTICE NEGRON GARCIA, concurring.

San Juan, Puerto Rico, April 5, 1982

Once the more or less heated debates this bona fide matter might stir have been overcome, we must recognize, in strictly legal terms, the constitutionality of compulsory membership. We propose and hold the vision that the institutional unity of attorneys is a legitimate purpose for the practice of law, *imperative*, *consubstantial* and *immersed* in the guiding axiom enshrined in Art. V of our Fundamental Law creating "a unified judicial system for purposes of jurisdiction, operation, and administration." Sec. 2. Although the document of the Constitutional Convention is silent with regard to this matter, the same shows that the whole extensive debate regarding the Judicial Power was prompted and stimulated by the ideal of achieving an efficient administration of justice. 4 *Diario de Sesiones* 2608-2614 (1961). Furthermore, the Bar Association was one of the organizations that, institutionally and through its members, more contributed to the discussion, analysis and drafting of our Constitution. We need not strain our minds to understand that the association in question, and the regulation of the practice of law, are inexorably linked to this efficient undertaking in *furtherance* of justice. Hence, it is impossible to separate one from the other; *an integrated judicial system* is the marrow of constitutional operational dynamics, and goes

hand in hand with the *integrated regime of compulsory membership*. It is part of and is congruent with the more transcendental mandate and parliamentary scheme which must necessarily yield to the also important concept of an *unconditional* right to assemble.

Integration of the legal profession is a method that guarantees that the best ethical postulates shall be implemented. It is buttressed on the state's police power to require membership of those who are interested in and desire to practice a profession. In view of the evolution of contemporary thought, nobody questions the need that admission to the bar —and to so many other trades and professions—entail a certain education, preparation, academic background, and intellectual and moral conditions. How then to object compulsory membership when the Legislative or Judicial Power have thus provided in order to further a public interest and as a means to attain continuity in such attributes?

Based on the foregoing constitutional scheme, we endorse the opinion of the Court upholding the validity of the compulsory membership ordered by the Legislature in Act No. 43 of May 14, 1932 (4 L.P.R.A. § 771 *et seq.*) —particularly directed to aid the inherent power of this Court— "to regulate the legal profession.... Countless decisions before and after the approval of the Constitution hold that 'The removal, as well as the admission to the practice of law is an inherent power of the Supreme Court of Puerto Rico.' *In re Liceaga*, 82 P.R.R. 245, 248 (1961); *In re Andreu*, 81 P.R.R. 87, 117 (1959); *In re Pagan*, 71 P.R.R. 712, 714 (1950); *In re Abella*, 67 P.R.R. 211, 219 (1947); *In re Gonzalez*, 65 P.R.R. 357, 367 (1945); *In re Bosch*, 65 P.R.R. 232, 234 (1945); *In re Arroyo*, 63 P.R.R. 764, 766 (1944); *Guerrero* v. *Court of Tax Appeals*, 60 P.R.R. 236, 244-247 (1942); *Ex parte Jimenez*, 55 P.R.R. 51 (1939); *In re Tormes*, 30 P.R.R. 248, 249 (1922). The fundamental reason for this doctrine was clearly expressed in *In re Diaz*, 16 P.R.R. 79, 88 (1910): 'The mission of attorneys at law in

society is of great nobility, because they are called upon to assist in the honest administration of justice. Not only the parties interested in the proceedings, but the courts themselves trust in them.' Recently we reaffirmed that '[h]is mission as such is not limited merely to represent private interests—in this case his own— but to be a legal and efficient instrument in the administration of justice and order in our society.' *Martinez Rivera* v. *Sears, Roebuck*, 98 P.R.R. 629, 639 (1970)." (Footnote deleted.) *In re Rodriguez Torres* 106 D.P.R. 698, 748-749 (1978)—dissenting opinion.

As any other human institution, the Bar Association is not infallible. Its past or present mistakes, the annoyance of some of its members before its public pronouncements, do not justify its elimination in a pluralistic society such as ours. There are sufficient and alternate remedies to do away with excesses. The guidelines adopted today by this forum are part of the different minimum avenues to achieve that end and to protect the opinion and financial contribution of dissident members, be they a majority or a minority. We must understand that the petty rivalries or political passions that take place in this type of entity, the rejection of groups that often, whether or not they are correct, proclaim themselves the speakers of the whole membership, are simply the risks inherent and natural to the dynamics of all groups that are open to any stand or criticism. They are not overwhelming reasons sufficient to destroy an institution that is deeply rooted in Puerto Rican society and which has historically distinguished itself as an open and free forum that has protected many worthy causes.

Neither is it sufficient to promote and exchange its disappearance through the inevitable advent of *voluntary* associations, held together not by the motto "Honrando La Toga" ("Honoring the Legal Profession"), but grounded on the different ideologies of the politico-partisan repertoire of the country. This would create serious difficulties and would

undermine this Court's supervising and controlling functions, aside from causing an even more profound division in our already polarized society. The search for truth and of solutions snaps when discussion channels are closed.

> We should not forget that all democratic systems of government rest on the free exchange of ideas. History teaches us that where said right is curtailed a crisis of common sense has intervened beforehand.
>
> > "What should be understood by crisis? 'Crisis is a peculiar historical change,' states Ortega. It is a change that consists 'in that the world where one lived has come to an end: man is left without his previous convictions; without a world. It is a change that is negative at the beginning—critical. One does not know what to think next—one only knows, or thinks one knows, that traditional ideas are false, inadmissible. A profound distaste is felt for everything or almost everything that was previously held as true; but the truth of the matter is that one does not yet possess any new positive beliefs to substitute for the traditional ones. Since that system of convictions or world was the framework in which man was permitted to walk with certain security among things, and now has no such framework, man once again feels lost, confused, disoriented.' In critical times man 'lives between two beliefs, without fitting in neither.' Heras, [*Curso de Derecho Constitucional*, 1957], at 177."
>
> Freedom is like water: we notice its necessity when we do not have it, but, in excess, it drowns us. Only moderation comforts the soul and soothes the body. *Ortiz Anglero* v. *Barreto Perez*, 110 D.P.R. 84, 113 (1980) (concurring opinion).

This call to common sense, to moderation, to tolerance and to mutual respect between those who integrate the legal forum, and particularly those who are devoted paticipants of its internal matters, is the present challenge of the present and future generations of lawyers, and is an example that should shine over and extend to all society. The more lawyers there are, the greater shall be the challenge as well as the need for compulsory membership of the Bar Association as a common denominator and means to discharge such a noble profession, and to enable this Court to efficiently discharge its disciplinary power for violations to ethics, and to administer the unified judicial system.

IN THE SUPREME COURT OF PUERTO RICO

No. 0-77-431

BAR ASSOCIATION OF PUERTO RICO,
PETITIONER

v.

ROBERT E. SCHNEIDER *et al.*,
RESPONDENTS

COMPLAINT

MR. JUSTICE NEGRON GARCIA, disqualifying himself.

San Juan, Puerto Rico, June 16, 1982

Today, for the first time, the undersigned justice found out[1] that in the voluminous record of the above captioned case—commenced on November 21, 1977, through a petition signed by the then President of the Bar, Atty. Graciany Miranda Marchand, and that, as of today, has two parts of more than five hundred (500) pages and annexes, where many (thirty-seven (37))lawyers signed different documents on different dates—the name of his brother Arturo Negron Garcia appears typewritten in a list of fifteen (15) additional lawyers at the end of one of the Bar Association's memorandums. It is

[1] Because he was summoned this morning as a member of this Court which was sued in an action for declaratory judgment, injunction, and damages filed on June 11, 1982, before the United States District Court for the District of Puerto Rico, in case No. 82-1459, filed by Robert E. Schneider, Jr., and Hector R. Ramos Diaz. There, on p. 19, title 48(u) it says: "That all the justices are active members of the Colegio and, on information and belief, a majority of the Justices, at some time, have acted on the governing board of the Colegio or have otherwise participated in its affairs and activities. Associate Justice Antonio S. Negron Garcia, who wrote a separate opinion concurring with the Ruling of the Supreme Court, *is the brother of Arturo Negron Garcia who is listed in the Colegio's brief as one of the lawyers for the Colegio* and is a candidate for President of the Colegio." (Emphasis supplied.)

only in this document signed by attorneys Graciany Miranda Marchand and Raul Serrano Geyls, that his name is mentioned in an isolated, plural, and incidental manner. We had not become aware of this fact.

Since we were not aware of this fact, nor did we have, at any of the stages of this proceeding, the benefit of an express and timely indication to that effect by the parties or by any other person, we participated in the decision on the merits and signed a separate opinion concurring with the unanimous decision of the Court upholding the constitutionality of the statute on compulsory membership. We also took part in the later proceedings for partial execution.

Regardless of our firm and reiterated constitutional criterion to that effect, grounded on strict and well-meditated legal conscience—which rejects any foreign notion, idea or situation that is not directed to the moderate and objective performance of full justice, and which transcends our condition as member of the Bar, or any family ties—the rule has always been to disqualify oursélves sua sponte whenever there is, and we learn of any circumstance that so warrants, or if any of the protagonists directly or indirectly involved, so justifies. *Santiago* v. *Superintendente de la Policia*, 112 D.P.R. 205 (1982), vote of disqualification; Resolutions of June 15, 1982, cases Nos. 0-82-358 and 0-82-367, *E.L.A.* v. *Pueblo International, etc.* Faithful to such spirit, for the sake of procedural integrity, and observing a strict interpretation of the Canons of Judicial Ethics, we hereby disqualify ourselves from further participation in this case.

The Chief Clerk shall immediately certify and serve notice of these presents on the parties' attorneys and on the Bar Association, for its timely publication.

APPENDIX F

IN THE SUPREME COURT OF PUERTO RICO

No. 0-77-431
Professional Conduct

BAR ASSOCIATION OF PUERTO RICO,
PLAINTIFF,

v.

ROBERT E. SCHNEIDER, et al.,
DEFENDANTS.

CHIEF JUSTICE PONS NUNEZ DELIVERED THE OPINION OF THE COURT.

SAN JUAN, PUERTO RICO, JUNE 26, 1986

I

IN 1982, in an opinion of Chief Justice Trias Monge, this Court held, *inter alia*, that: Act No. 43 of May 14, 1932, which creates the illustrious Bar Association of Puerto Rico (Bar Association); compulsory bar membership; the imposition of dues; and the statutory provision that compels attorneys to cancel stamps and pay dues to the Bar Association, are constitutionally valid. We also decided that the Bar Association may engage in any activity authorized by the Legislature of Puerto Rico or by this Court, which activity is rationally linked to the purposes laid down in Act No. 43, *supra*, or in the order that this Court may issue on its day; that the Bar Association enjoys full freedom of expression under the provisions of Art. II, Sec. 4, of the Constitution of the Commonwealth of Puerto Rico, and that the Bar Association's freedom of expression, in behalf of the majority of its members, cannot be curtailed by dissenting bar members. This Court decided further that by reason of its freedom of expression the Bar Association

may, constitutionally, pronounce itself on ideological matters, but that the members who dissent from such pronouncements are entitled, under the Constitution of Puerto Rico, to object to the use of their contributions or of part thereof for the ideological activities they do not approve.

As a consequence of the foregoing, we decided that an adequate remedy was necessary to enforce the dissenting members' right not to contribute money to pronouncements or activities of an ideological nature. To such ends, the Court set up a procedure to allow the Bar Association itself to structure the proper remedy. See *Colegio de Abogados de P.R.* v. *Schneider*, 112 D.P.R. 540 (1982).

Later, on May 6, 1982, we issued a resolution retaining our jurisdiction in the case to take cognizance of matters dealing with that part of our judgment that refers to the remedy. We also retained jurisdiction to approve, modify, or disapprove the remedy the Bar Association could finally structure. In June 1982, we suspended attorneys Robert E. Schneider and Hector Ricardo Ramos Diaz from the practice of the legal profession for failing to comply with that part of our judgment which ordered a temporary payment of dues to the Bar Association until the remedy was finally devised.

Attorneys Schneider and Ramos then filed with the United States District Court for the District of Puerto Rico (Federal Court), an action on Declaratory Judgment and Injunction and Damages against the Bar Association, the Commonwealth Secretaries of Justice and of the Treasury, and the Justices of this Court[1] which action was based on the alleged unconstitutionality of Act No. 43, *supra*, of compulsory bar membership and of the obligation to cancel stamps and pay dues to the Bar Association.

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[1] Later on, by decision of the Court of Appeals for the First Circuit, the action against the Justices of this Court was dismissed, although the Justices were retained as nominal parties in their administrative character as to the causes of action challenging the cancellation of notarial and bar stamps. *In re Justices of Supreme Court of Puerto Rico*, 695 F.2d 17 (1st Cir. 1982).

On June 25, 1982, the Bar Association filed an informative motion before this Court giving its conception of what were ideological activities. In December 1982, it submitted the remedy it had structured pursuant to our judgment.

After elucidating several procedural incidents and collateral issues, on June 16, 1983, in an opinion of Chief Judge, Hon. Juan R. Torruella, and before this Court had pronounced itself on the remedy devised by the Bar Association, the Federal Court held that the remedy was a "sham," that secs. 3, 4, 10, and 11 of Act No. 43, *supra*, part of sec. 6 of Act No. 99 of June 27, 1956, and part of sec. 38 of said Act No. 99, as well as Act No. 115 of May 6, 1941 (4 L.P.R.A. § 785), as applied, enforced and construed, violated the provisions on freedom of expression and of association contained in the First Amendment to the Constitution of the United States, and were contrary to the Fifth and Fourteenth Amendments to said Constitution. Due to said decision, and until the Bar Association ceased to hold such activities, the Federal Court issued an injunction barring any type of disciplinary measures against bar members for failing to pay their dues, barring infringement of a person's right to practice law for failure to pay such dues or for not being a member of the bar, barring the use of funds and public facilities for selling bar stamps for the benefit of the Bar Association, and barring further that validity be denied to any pleading, public instrument, and deed for the failure to affix and cancel bar or notarial stamps on such documents. *Schneider* v. *Colegio de Abogados de Puerto Rico*, 565 F.Supp. 963 (1983). Said Court refused to stay the effectiveness of the injunction while the Bar Association was seeking appeal from said judgment before the United States Court of Appeals for the First Circuit. *Schneider* v. *Colegio de Abogados de Puerto Rico*, 572 F.Supp. 957 (1983).

Upon issuing the unconstitutionality decree, the Federal Court essentially limited its findings of fact to those it deemed more ideological or politico-partisan activities, but failed to describe or to make any determination with regard to other

activities held by the Bar Association, or to the proportion of resources devoted to ones or the others.

When the case was brought before the United States Court of Appeals for the First Circuit, said Court stayed the injunction and reversed the Federal Court's decision. *Romany* v. *Colegio de Abogados de P.R.*, 742 F.2d 32 (1st Cir. 1984).

In so doing, the First Circuit stated that this case required the Federal Court's abstention, that is, the exercise of the federal jurisdiction should have been stayed until this Supreme Court could provide a remedy, or before that in case of an unreasonable delay. The First Circuit also held that this Supreme Court should provide, if it was willing to do so, an immediate temporary remedy to safeguard the rights of the parties until a permanent remedy was structured and the parties' claims were given a definitive solution.

On November 13, 1984, we issued an order providing a temporary remedy. On that same date we ordered a hearing to give the parties the opportunity to bring evidence. This Court appointed the Hon. Mariano Ramirez Bages (the Special Master), former justice of this Court, to preside over the hearing.

We later reinstated Scheider and Ramos to the practice of the legal profession in view that they had opted for the temporary remedy decreed.

On January 4, 1985, a prehearing conference was held before ex-Justice Ramirez. At the hearing, attorney Hector Marquez, on his own behalf and on behalf of the respondents, attorneys Oreste Ramos Diaz, Jorge Romany, and Jorge Souss, filed a motion asking to be relieved from further participation in the case. The petition was granted and proceedings continued with regard to attorneys Robert E. Schneider and Hector Ricardo Ramos Diaz. During the conference, the Bar Association announced that it would bring extensive oral and documentary evidence. Attorneys Schneider and Ramos Diaz announced that they would bring no evidence at all.

On January 23, 1985, the parties signed a stipulation asking for the modification of the November 13, 1984 resolution and

covering some procedural aspects. The same was approved by the Court on the following day.

The evidentiary hearing was held on January 15 and 22, February 4, 5, and 6, and March 11, 13, and 25, 1985. During the same, the Bar Association brought abundant oral and documentary evidence. Said evidence was not controverted by the attorneys. Though at the prehearing conference the respondents had said that they would not bring evidence, in the course of the hearing Atty. Schneider asked permission to submit the record of the case before the Federal Court. The Special Master agreed to attorney Schneider's petition and the record was received in evidence.

On March 25, 1985, at the end of the hearing before the Special Master, the latter ordered the parties to submit a proposal on "findings of fact after the federal record is filed." Since as of April 30 attorneys Schneider and Ramos had not filed the record of the case before the Federal Court, the Special Master gave the parties 30 days to file a summary of the evidence brought in the case. The parties failed to file the summary of the evidence within the thirty (30) days and since the record of the case before the Federal Court was received on June 11, 1985, the Special Master, through an order of June 12, gave them 30 days more. The Bar Association sought and obtained an extension of time and on August 9 filed with the Special Master a draft Summary and Analysis of the Evidence, Findings of Fact, Conclusions of Law, and a Remedy. Attorneys Schneider and Ramos Diaz did not propose any remedy; but, through a motion of September 20, 1985, they just raised objections to the Bar Association's draft and counterproposed findings of fact and conclusions of law summarizing and analyzing the evidence vis-a-vis the Bar Association's proposals.

On November 13, 1985, the Special Master filed his report.

On March 18, 1986, we asked the parties to illustrate this Court as to how these proceedings would be affected by the United States Supreme Court decision in *Chicago Teachers Union* v. *Hudson*, 475 U.S. 292, 106 S.Ct. 1066, 89 L.Ed.2d

232 (1986). The Bar Association and attorneys Schneider and Ramos appeared setting forth their positions.

We shall provide the remedy in accord with the circumstances of fact and of law. First, however, we will complement, in the light of the evidence in the record of this case, the Federal Court's findings of fact as well as those contained in our case *Colegio de Abogados* v. *Schneider*, *supra*. We think this is necessary because the analysis of the Federal Court only extracted, from the evidence brought before it, those examples that, in its opinion, evinced ideological or politico-partisan activities. Said Court did not deem it convenient to describe the manifold character of the Bar Association, or of its other activities, or the proportion of resources devoted to them.[2] However, it would be tiresome to enumerate all the activities here. The evidence of such activities contained in the record, and summarized in the appendix attached hereto, is quite abundant, thus we will limit ourselves to drawing some conclusions which, in general, collect the evidence presented, including the activities summarized in the appendix and which complement the conclusions already drawn in the long pilgrimage of this case. Let us see.

II

Complementary Conclusions of Fact

The Bar Association has adequately complied with the obligations imposed by the law that created it. It has contributed to the improvement of the administration of justice, it has drawn reports; it has answered consultations sought by the Government; it has zealously defended the rights and immunities of attorneys seeing that they enjoy before the courts the

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[2] On this particular the United States Court of Appeals for the First Circuit stated:

> "In the instant case, while the district court canvassed the range of the Colegio's ideological activities, it did not describe the Colegio's other pursuits or the proportion of resources devoted to them." *Romany* v. *Colegio de Abogados de P.R.*, 742 F.2d 32, 41 n.9 (1984).

freedom necessary for the good discharge of their professions; it has promoted brotherly relations among its members; and has looked after a healthy professional morale among bar members. It has also contributed to the enrichment of the intellectual life of attorneys and has strengthened a collective aspiration to a law-abiding democratic society.

The Bar Association is a democratic entity. Its President, its Board of Governors, and the directive bodies of the Delegations are elected in assemblies that guarantee to all bar members the participation, freedom of expression and right to present and to debate resolutions. The annual assembly approves the budget of the institution. The institutional life encourages open participation and tolerance.

The institution has fostered freedom of expression among its members and among citizens in general. Through the payment of a preestablished rent any person, natural or artificial, wishing to exercise the freedom of expression guaranteed by the applicable constitutional provisions, may use any of its physical facilities. By regulation, it releases from such payment certain institutions closely related to the functions entrusted to the Bar Association, which institutions are mainly constituted by attorneys or law students. Being a free forum for the legal profession and for the community, the Bar Association has promoted art exhibits, craft shows and, in short, has contributed to the improvement of the quality of life. The institution plays an important role in the vital development of the country.

The Bar Association has about thirty-five (35) standing or special committees. Among others, we can mention the following: Ethics; Legislation; Legal Education; For The Study of the Constitutional Development; Evaluation of Judicial Appointments; Evaluation of Prosecutors Appointments; Family Law; Criminal Law; Labor Law; Electoral Process; Insurance; Property and Notarial Law; Freedom of Expression, of Information and of the Press; Consumer Rights; Women Affairs; Bar Association Regulations; Public and Cul-

tural Activities; Sports; International Law and Relations with Professional Organizations having an International Character; Nuclear Arms Threat; Scholarships; Natural Resources and Environmental Quality; Computers and the Law; Relationship between Judges, Prosecutors, Registrars and Attorneys.

The evidence showed, beyond all doubt, that these committees play an effective and fruitful professional role for the institution and for the community. The Ethics, Legislation, and Legal Education Committees are made up of devoted and distinguished attorneys who have discharged their work in a very professional manner. The testimony of the President of the Bar Association and an examination of the documentary evidence show that, in general, the composition and discharge of the work by other committees have also been adequate.

The work performed by the Ethics Committee constitutes an effective effort to guarantee that all attorneys neatly comply with their professional obligations. The Legal Education Committee and the Institute of Practical Education, through which it operates, have contributed to improve the quality of legal education by making possible a master degree program at the Catholic University. It has a bar examination program in which a great number of professors of all the universities of Puerto Rico participate. It also holds seminars, forums, and similar activities. The Legislation Committee renders professional services to the Bar Association, to the Legislature and to the Government. Many times the Governor of Puerto Rico has sought the cooperation of the President of the Bar Association with regard to the appointment of judges and prosecutors. The Legislature systematically seeks the opinion of the Bar Association in matters affecting the administration of justice, civil rights, or the fundamental interests of the citizenry.

Furthermore, the Bar Association has collaborated with the Board of Bar Examiners and with the Supreme Court in matters dealing with the judicial conferences and the state of legal education. The Supreme Court has frequently consulted the Bar Association with regard to the approval of some regula-

tions bearing on the practice of the profession. Many government agencies consult the Bar Association as to law issues vital to social interest. That is, the Bar Association has been an effective collaborator with the different branches of the government and has been at the service of the bar members and of the community.

The publications of the Bar Association constitute another contribution to the strengthening of professional life. The institution offers a service through which it publishes and distributes among its members, free of additional cost, the opinions delivered by the Supreme Court. It also distributes a publication entitled "Notificaciones del Director Ejecutivo" (Notices of the Executive Director), which contains news of interest for attorneys. It collaborates with the Office of Court Administration in the publication and distribution of the review "Forum," which is distributed free of charge among judges and attorneys and which is aimed at improving the quality of the administration of justice and rising the level of the legal practice. The *Revista del Colegio de Abogados de Puerto Rico* (Bar Association Law Review) was founded on January 1, 1914. It has been a free forum where, naturally, the authors assume all responsibility for their writings. It has been thus specified since 1984. The law review has received collaborations of the most distinguished attorneys in Puerto Rico and circulates abroad. The Bar Association also publishes and distributes a Program for the Annual Assembly which contains, among other things, a certified financial statement and budget for the following year. Bar members receive all these publications free from additional costs. Besides those mentioned, the Bar Association sponsors the publication of many and diverse works, books, pamphlets, and reports that significantly contribute to the improvement of professional life.

The Bar Association renders many exceptional services to the community. It would suffice to mention the effective participation in the Legal Services Corporation, in the Legal Aid Society and in the Santurce Legal Office. Its Voluntary Legal

Service Program (Pro Bono) has the collaboration of more than 800 attorneys who devote their efforts to the defense of indigents. The extraordinary social contribution of the Pro Bono program to our country in 1984 made it worthy of the Harrison Tweed Award it received from the American Bar Association in 1984.

The Bar Association income comes from the bar members' dues (amounting to $100 yearly per member), the sale of bar and notarial stamps, the superavit of the notarial bonds, proceeds from review subscriptions, rent of premises, interests, the sale of books, and other miscellaneous revenue. During 1984, the institution had an income of $1,318,440 and expenses amounting to $1,361,105, which reflected a $42,665 deficit. The 1985 budget draft bill estimated an income of $1,247,800 and expenses of $1,288,785 for an estimated deficit of $40,985.

The institution has procured death insurance for each bar member amounting to $15,000, but which is reduced to $7,500 when the attorney dies after his 70th birthday. In case of accidental death, the compensation is $30,000 for attorneys under 70 years of age and $15,000 for those who are older.

The studies show that the cost of the insurance premium per bar member amounts to $73.76 and that the cost of the opinions distributed among bar members amounted to $22.45 per bar member during 1984.

The Bar Association carries a strict bookkeeping of its income and expenses. It has a competent and responsible internal and external auditing system. It has devised a system by virtue of which it is possible to determine the direct and indirect cost of any activity in such a way that anybody can accurately say what contribution would correspond per bar member to a specific activity.

Since the establishment of the procedure allowing bar members to object to activities that they could understand are ideological in nature, only 150 of the 6,704 bar members (2.24%) have exercised the option to ask that 50% of their dues be

deposited in an escrow account. It is significant that up till the hearings before the Special Master came to an end nobody had objected to any specific activity held by the institution since the date when the escrow account system was established as a temporary remedy.

To sum up, a study of the evidence shows the manifold character of the Bar Association activities and the intimate relationship of most of them with the legal profession and the ends and purposes of the Bar Association. However, as we have already seen in *Colegio de Abogados*, *supra*, *Schneider*, *supra*, and *Romany*, *supra*, the Bar Association has held other activities that have been challenged by some bar members. In *Schneider*, *supra*, the Federal Court enumerated the activities which, in its opinion, were ideological.

After carefully examining all the evidence presented before the Special Master, as well as all the evidence brought before the Federal Court, we conclude that the so-called ideological activities are only a minimum vis-a-vis all the work performed by the Bar Association.

III

In *Colegio de Abogados*, *supra*, we already examined the compelling state interests in this situation vis-a-vis the individual constitutional rights of freedom of speech and of assembly, not in their classic modality of barring them but in the mandatory character of assembling and identifying with the expression of the association.

Therein, we said on page 549:

> The public interest in the creation of a strongly pluralistic society, in furtherance of the practice of law and of the good operation of the judicial system, outweighs the personal inconveniences that compulsory membership might entail. The right not to assemble, which can be derived from the opposite right consecrated in the Constitution of

the Commonwealth, Art. II, Sec. 6, gives in before the above-mentioned interests, of such a clearly urgent nature under the Puerto Rico constitution.

[1] The erosion of the constitutional rights of the dissenting attorneys is small and tolerable and does not require a sacrifice of the compelling state interests or the enervation of the constitutional rights of the Bar Association in view of: (1) the balance already stricken between the conflicting interests in this matter: (2) the fact that, in the proceedings before the Special Master, the attorneys who appeared did not offer any evidence to the effect that the mandatory contents of compulsory bar membership went beyond a financial contribution; (3) that, as we have concluded, the so-called ideological activities constitute a minimum in view of all the work performed by the Bar Association; and, (4) that the statute furnishes the institution with a democratic structure.

[2] Notwithstanding the fact that the erosion is small and tolerable we also decided in *Colegio de Abogados*, *supra*, at 554-555, that "[o]n the other hand, lawyers who dissent from such pronouncements — and not those who object to the Bar Association's performance of its statutory purposes or of those imposed by this Court — enjoy, under the Constitution of Puerto Rico, the right to raise objection to the use of their contributions or of part thereof for ideological activities they do disapprove."

It is precisely to deal with that right to object that we have acknowledged to the dissenting attorneys that we must provide a remedy. Before doing so, however, we deem that we must briefly refer to two cases recently decided by the United States Supreme Court which, because of the date of the decision were not considered in *Colegio de Abogados*, *supra*. These cases provide additional general guidelines for devising the remedy.

[3] We will refer to those cases, as well as to other cases decided by the United States Supreme Court, for comparative

and orientation purposes because we have concluded, within the framework of this controversy, that "the sense of the freedom of speech clause contained in Art. II, Sec. 4 of the Constitution of Puerto Rico is not narrower than that given by the United States Supreme Court to the First Amendment in this context [unions with agency shop clause]." *Colegio de Abogados, supra*, at 554.

[4] In *Chicago Teachers Union, supra*, said Court reiterated that the purpose of the remedy is to devise a mechanism to prevent an institution from using the dues of those who object to subsidizing ideological activities, without unduly restricting the institution's ability to require members to contribute to the cost of complying with the purposes and ends required from the institution in behalf of the compelling interests pursued.

[5] Before that the United States Supreme Court, in *Ellis* v. *Railway Clerks*, 466 U.S. 435, 104 S.Ct. 1889, 80 L.Ed.2d 428 (1984), rejected, for its inadequacy, the simple mechanism of refunding the dues to the dissenters because that resulted in a temporary benefit or an involuntary loan to the syndicate involved. It then proposed as alternatives advanced discounts in the dues or deposits in escrow accounts. It then went on to examine specific activities of the syndicate in order to determine their ideological character; for example, the assembly, the litigations, the publications, the social activities, etc.

Chicago Teachers Union, supra, at 244-245, complemented those pronouncements and elaborated, with greater strictness, on the procedural measures required by the interests in conflict. It grounded such requirements, within the context of the syndical relationship, as follows:

> Procedural safeguards are necessary to achieve this objective for two reasons. First, although the government interest in labor peace is strong enough to support an "agency shop" notwithstanding its limited infringement on nonunion employees' constitutional rights, the fact

> that those rights are protected by the First Amendment requires that the procedure be carefully tailored to minimize the infringement. Second, the nonunion employee — the individual whose First Amendment rights are being affected — must have a fair opportunity to identify the impact of the governmental action on his interests and to assert a meritorious First Amendment claim. (Footnotes omitted.)

Chicago Teachers Union, 475 U.S., at 292, 106 S.Ct., at 1066, 89 L.Ed.2d, at 244-245.

[6] The main procedural measures ratified and elaborated in these cases may be summarized as follows: (1) potential objectors must receive adequate information to justify the dues imposed, when the dues reduction method has been chosen, or the proportion deposited, when the escrow account method has been chosen; (2) the adjudication process must be reasonably speedy and carried out before an impartial forum so that it may be fair and objective; (3) the dissenter only has the simple obligation to let others know of his objection because the same is not presumed; and (4) the Bar Association has the burden of proof to establish the proportion of dues used for the objected activity.

[7] In view of all the facts determined, of our decision in *Colegio de Abogados de P.R.* v. *Schneider*, *supra*, construing the rights of the parties in the light of the Constitution of the Commonwealth of Puerto Rico, and of the trend followed in *Lathrop* v. *Donohue*, 367 U.S. 820, 81 S.Ct. 1826, 6 L.Ed.2d 1191 (1961); *Romany* v. *Colegio de Abogados de P.R.*, *supra*; *Machinists* v. *Street*, 367 U.S. 740, 81 S.Ct. 1784, 6 L.Ed.2d 1141 (1961); *Railway Clerks* v. *Allen*, 373 U.S. 113, 83 S.Ct. 1158, 10 L.Ed.2d 235 (1963); *Abood* v. *Detroit Board of Education*, 431 U.S. 209, 97 S.Ct. 1782, 52 L.Ed.2d 261 (1977); *Ellis* v. *Railway Clerks*, *supra*, and *Chicago Teachers Union*, *supra*, and in the exercise of our responsibility and inherent power, we devise the remedy for those who object to the use of

their contributions and of the Bar Association resources for activities foreign, not germane, to the ends and purposes of such institution. Although the activities which have led to these proceedings are those up to now called "ideological," we think it is more proper to refer to them collectively as "objectionable activities."

[8] The purpose of the remedy here structured is to provide to such bar members an instrument for effectively enforcing their rights and for preventing that their financial contributions be used to defray objectionable activities and to subsidize the same through the use of the facilities and resources of the Bar Association.

IV
The Remedy

A. *Definitions — "Objectionable Activities"*

[9] "Objectionable activities" shall be those that the Bar Association of Puerto Rico may legally hold in the exercise of its constitutional rights and within the historical, social, and political context that has given it life such as ideological activities, but with regard to which any member, in the exercise of his or her constitutional rights, may validly object to the use of his or her bar dues for either financially subsidizing such activities or providing them with the use of the Bar Association's facilities or resources. Activities comprised within the Bar Association's purposes and ends which are germane thereto shall not be considered objectionable activities. The functions and purposes of the Bar Association are:

1. To adopt, with the consent of the Supreme Court of Puerto Rico, the Canons of Professional Ethics which shall govern the conduct of lawyers.

2. To receive and investigate whatever complaints are brought with regard to the conduct of its members in the legal practice.

3. To institute disbarment proceedings before the Supreme Court of Puerto Rico.

4. To keep a sound and strict professional morale among lawyers.

5. To protect its members in the practice of the profession.

6. To create public assistance funds, insurance systems and special funds to aid its members or their heirs.

7. To advocate for the rights and immunities of lawyers.

8. To see to it that the lawyers enjoy enough freedom before the courts to enable them to duly discharge their duties.

9. To promote brotherly relations among its members.

10. To raise the educational, cultural, and ethical standards of lawyers in order to improve the quality of the legal services offered to the people.

11. To establish programs to serve the community and the legal profession, among them, legal and social aid programs for indigents for which purpose it will have the power to promote the creation of institutions that may aid the Bar Association to achieve its end, such as the Fundacion del Colegio de Abogados (the Bar Association Foundation).

12. To contribute to the betterment of the administration of justice.

13. To evaluate the reports and consultations claimed by the Government.

14. To create a real property title insurance corporation.

15. To exercise other powers conferred by law or by the Supreme Court of Puerto Rico and any other incidental powers necessary or convenient for the ends of its creation and which are not in disagreement with the purpose and the law which creates the Bar Association.

[10] The objectionable activities of third parties who use the Bar Association facilities shall not be subject to this remedy if the same are not paid with Bar Association funds or if they generate proceeds for the Bar Association to cover its costs and expenses. If such activity only generates income for the Bar Association partially covering the costs and expenses incurred by it, the difference or the balance thereof shall be understood to belong to the subsidy contributed to the same by the Bar Association and such balance will be subject to the remedy.

B. *Review Board of the Bar Association Activities*

[11] 1. The Review Board of the Bar Association Activities is hereby created as an autonomous body.

2. The Review Board shall be composed of three members appointed by the Supreme Court of Puerto Rico. The term of each member will expire two years after the appointment is made through resolution of this Court, without prejudice that it be extended for an additional consecutive term. As an exception to this rule, the first three members of the Review Board will be appointed for terms of one, two and three years respectively. The Court may, also, in the exercise of its powers appoint two substitute members in case any of its members cannot participate in any particular matter.

3. The members of the Review Board will be chosen among former justices of this Court or ex-judges from the Court of First Instance.

4. According to the needs and workload of said Review Board, and at its request, the number of its members may be increased by resolution of this Court.

5. The Review Board of the Bar Association Activities, following the procedural standards and guaranties laid down in the case law of this Court and in this remedy, shall examine the activities held by the Bar Association which have been objected to in order to determine whether the same are objectionable. It shall also compute the amount of dues to be refunded to the dissenting bar members whenever proper.

6. The Review Board shall approve a set of rules on the procedures before its consideration where it will provide, among other things: a speedy administrative hearing with due notice; a simple and fair proceeding; precise and reasonable terms; opportunity to the parties to present evidence in their behalf and to face adversary evidence; and that findings of fact and of law be made.

7. The regulations will be amended by decision of the Review Board or by decision of this Court. The Bar Association shall disseminate the regulations and the amendments thereto among all its members.

8. The Bar Association shall provide and make accessible to the Review Board the physical facilities and materials necessary for its adequate operation.

9. The Bar Association, through its communication channels, will keep its members up to date in a brief and simple manner, with regard to the investigations, the proceedings before the Review Board, and the latter's resolutions and orders.

C. *Procedure*

[12] 1. *Notice of the right to object*

a. Upon paying his annual dues to the Bar Association, or at any later date during the year, any bar member shall be entitled to notify in writing to the Executive Director of the Bar Association that he wishes to enforce his right to object in a generic manner to the activities of the Bar Association having an objectionable character. This right will be effective from the date of the notice and with regard to activities held after the same.

b. The notice will be made in writing to the Executive Director either personally or by mail and in any case with return receipt requested. It shall not be necessary for the bar member to point out any specific activity. Absence of due notice by the bar member shall be understood as an authoriza-

tion to the Bar Association to use the bar member's contributions in accordance with the institution's general budget.

c. As soon as the Executive Director receives the aforesaid notice, he shall take an amount equivalent to fifteen percent (15%) of the dissenting bar member's dues and deposit it in an escrow account, apart from other Bar Association accounts, which account will bear the name of each dissenting bar member. It being understood that if the generic objection to the activities is presented after the expiration of the payment of dues, the amount to be deposited in escrow will be computed on the balance of the annual dues resulting when the same is prorated throughout the annual term. The account will be adjusted to the interest rates and terms prevailing in the market. The Review Board shall have the duty and power to change, within what is reasonable, the proportion of the dues to be deposited in escrow according to the experience acquired.

d. Every bar member may object to any specific activity, without having previously notified a general objection, in which case, the remedy shall only benefit him as to said particular activity, if his claim prevails.

2. *Objections to objectionable activities*

a. An objection to a specific activity of the Bar Association for its alleged objectionable character, shall be made before the Review Board of the Bar Association Activities within the reasonable term provided in the Regulations.

b. Notice and adjudication of the objections to the activities of the Bar Association shall be governed by this remedy and by the Regulations.

3. *Adjudication of the objections filed by bar members*

a. The Review Board shall promptly adjudicate the objections filed by bar members according to the provisions of the Regulations. It shall notify its decision to the dissenting bar members and to the Bar Association.

b. The cost of every objectionable activity shall be determined by adding up all direct and indirect expenses incurred

by the Bar Association in the same. The proportional amount of the dues to be refunded to the dissenting bar member will be equivalent to the proportion between the cost of the objectionable activity and the total proceeds received by the Bar Association in the form of dues for the year when the activity is held. The Bar Association has the burden of proving the cost and proportion of the dues used in said activity.

c. The adjudication of an activity as having an objectionable character shall benefit all bar members who have presented a general objection and those members who have particularly objected to it subject to the provisions in paragraphs 1(a) and 1(d) above.

d. The dissenting bar member and the Bar Association may, within a period of thirty days from the notice, seek review from the Supreme Court of the final decision of the Review Board.

e. If the Review Board, or the Supreme Court on review, finally determines that certain activities of the Bar Association in a specific year are of an objectionable character, the Executive Director of the Bar Association shall make an annual liquidation of the escrow according to the decision and order or decisions and orders issued by the Review Board or by the Court, refunding the pertinent amount of money to each dissenting bar member.

f. The annual liquidation shall not be made if there is an objection pending decision for that year, unless the Review Board orders a partial liquidation, guaranteeing that said account will hold enough funds to satisfy any pending objection.

g. Once said annual liquidation of the escrow account is made, the Executive Director of the Bar Association shall remit the surplus, if any, to the Bar Association's general funds.

D. *Notarial and bar stamps*

1. The proceeds form the sale of notarial and bar stamps shall not be used for objectionable activities.

[13] 2. The proceeds from the sale of notarial and bar stamps shall be used to pay for bar members' insurance, legal aid to indigents, legal advice to the community, to receive and investigate complaints filed with regard to the conduct of bar members in the practice of the profession, the publication of the opinions of the courts, and for any other purpose comprised within the duties and purposes of the Bar Association.

E. *Other remedies*

All the principles and procedures established in this remedy shall apply to the activities pointed out by dissenting bar members and which, in the opinion of the Review Board, have an objectionable character. Attorneys Schneider and Ramos Díaz and all those who had stood under the temporary remedy decreed by this Court may make a list of activities which, according to them, were objectionable from the date when each one of them filed their complaints, and they shall notify such list to the Review Board for it to take the pertinent measures.

None of our statements herein shall be understood as barring this Court sua sponte, at the request of a party or of the Review Board, considering the experience, development and effectiveness of the permanent remedy drawn herein to protect the rights of the bar members who object to objectionable activities, from devising other remedies and taking the measures it may deem necessary. To this end, and for the purpose of supervising and regulating the legal profession and in the exercise of our inherent power we keep and retain jurisdiction over this matter.

Judgment will be rendered accordingly.

APPENDIX

SUMMARY OF THE EVIDENCE

This appendix summarizes the oral and documentary evidence on Bar Association activities received during the course of the proceedings before this Forum, before the Special Master, and before the United States District Court for the District of Puerto Rico in *Schneider* v. *Colegio de Abogados*, *supra*, and other cases consolidated with this one.

The Special Master received the testimony of attorneys Abrahan Diaz Gonzalez, President of the Bar Association, and Antonio Bennazar Vicens, Executive Director of the Bar Association, who testified extensively on the functions and operations of the Bar Association and its activities. Also received was the testimony of attorneys Manlio Arraiza Donate and Jose A. Virella Santana, regarding the work done by the Ethics Committee. Attorneys Salvador Acevedo Colon, and Georgina Candal de Segurola, testified on the activities of the Legal Education and Professional Improvement Committee and of the Legislation Committee they respectively chaired. Mr. Juan Espiet Gonzalez also testified as External Auditor of the institution with regard to the system and the accounting practices used by the Bar Association. The oral evidence was not controverted.

This appendix closes with the description of the exhibits presented and received.

I. *Institutional structure*

The General Assembly of bar members, which is held once a year and to which all bar members may attend, is the maximum authority of the structure of the Bar Association, 4 L.P.R.A. §§ 776-777; Article 24 of the Regulations of the Bar Association; Tr. Ev., p. 15. The Assembly has the exclusive power to promulgate and amend the Regulations of the Bar

Association and to approve the budget submitted by the Board of Governors every year. Tr. Ev., p. 15.

Every two years, in the General Assembly, the bar members choose the President of the Bar Association through direct vote. In said assembly they may vote for two delegates-at-large. Four of the delegates to the Board of Governors are elected this way. 4 L.P.R.A. § 777; Tr. Ev., pp. 63-65. The Assembly also considers the resolutions submitted through the Executive Director. Tr. Ev., p. 16.

Besides his administrative functions, the President acts as speaker of the determinations, resolutions, and agreements taken by the Board of Governors of the Bar Association. Art. 37, Regulations of the Bar Association. *(Schneider*, Exhibit 4, p. 78.) As such, he is responsible for publicly disseminating its contents.

In the local sphere, the President often holds press conferences to communicate to the Puerto Rican community the agreements reached by the institution on different matters. *(Schneider*, Tr. Ev., pp. 9-11, 78, 99-102, 124-125; Exhibits 40, 96 to 107; see also Exhibits 148 and 154.) To such ends, he also appears in radio and television programs. He is special guest in acts and commemorations related to the administration of justice and to the practice of law.[3] He uses the government's official communication channels to inform the people of the position of the Bar Association and its committees on different controversies. Thus, in compliance with law — 4 L.P.R.A. § 772 — he resorts to the executive and legislative forums to contribute, criticize or advise as to possible solutions or controversies generally regarding pending legislation and

[3] Speech delivered in the swearing in of Judge Jaime Pieras in the United States District Court for the District of Puerto Rico *(Schneider*, Exh. 108); speech delivered in the swearing in of the Chief Clerk of the Supreme Court of Puerto Rico, attorney Lady Alfonso de Cumpiano, 111 D.P.R. XIII, XV-XVII (1980); Memorial Session in honor of the Honorable Armindo Cadilla Ginorio, Associate Justice of the Supreme Court, 103 D.P.R. IX, XIV (1975); Farewell ceremony of the Hon. Mariano H. Ramirez Bages, 101 D.P.R. XX (1973).

the appointment of public officers connected to the administration of justice. Tr. Ev., pp. 145-149; art. 33, Regulations of the Bar Association; *(Schneider*, Tr. Ev., pp. 79-81, 118-119, 146, 152; Exhibit 15).

He has gone to the United States Congress where he has appeared before several of its committees on different occasions. *(Schneider*, Tr. Ev., p. 78.) He has appeared before the United Nations Organization and some of its bureaus or committees, for example, the Decolonization Committee of the United Nations. These appearances have obeyed the mandate of the organisms that direct the destiny of the Bar Association: its General Assembly and its Board of Governors. 4 L.P.R.A. § 776. Tr. Ev., pp. 278-280, 419-421; Exhibit 36; *(Schneider*, Tr. Ev., pp. 82, 122-123). See: *Informe del Colegio de Abogados de Puerto Rico al Comite de Descolonizacion de las Naciones Unidas*, 35 Rev. C. Abo. P.R. 329-356 (1974); *Ponencia del Colegio de Abogados de Puerto Rico ante el Comite de Descolonizacion de las Naciones Unidas*, 39 Rev. C. Abo. P.R. 157-176 (1978). *(Schneider*, Exhibits 6a, p. 21; 6f, p. 23; 237-239). He has also appeared before the Permanent Latin American Missions to the United Nations, etc.

The Bar Association has been represented by its President or by special delegations before other forums or institutional bodies of the United States or other countries, whenever it has been the seat of encounters and exchanges with attorneys of other countries. Pennsylvania Bar Association *(Schneider*, Exhibit 6c, p. 20); Virgin Islands Attorneys Delegation *(Schneider*, Exhibit 6c, p. 46); Interamerican Federation of Attorneys *(Schneider*, Exhibit 6d, p. 24); American Bar Association *(Schneider*, Exhibit 6d, p. 26). See art. 35 of the Regulations of the Bar Association.

The President of the Bar Association is also a member of the directive bodies of other institutions which represent, aid, and give legal advice to indigents in Puerto Rico, among which we have, for instance, the Legal Services Corporation of Puerto Rico and the Puerto Rico Civil Rights Institute. *(Schneider*, Tr. Ev., p. 104; Exhibit 235, pp. 213-215.)

The Board of Governors is the Bar Association's governing body but it operates under the authority of the General Assembly. 4 L.P.R.A. § 776; art. 33, Regulations of the Bar Association. It is composed of the President of the Bar Association, the outgoing President, who has no right to vote, and thirty (30) delegates. 4 L.P.R.A. § 777. The twenty-six (26) delegates who are not elected by the General Assembly are chosen by the thirteen (13) regional delegations into which Puerto Rico is divided. 4 L.P.R.A. § 777; Tr. Ev., pp. 16-17. The Board of Governors elects the Board of Directors which has decision-making power during the term the Board of Governors is not constituted, Tr. Ev., p. 17. In its meetings, usually held once a month, the Board of Governors analyzes, studies, and participates in different institutional matters or matters of general interest brought before its attention. In these meetings all the bar members have a right to speak but not to vote. (*Schneider*, Tr. Ev., p. 177.) There are times when the Board of Governors states formally its position and recommendations as to certain controversies through agreements and resolutions. These are quite varied in character and include: internal administrative proceedings; the approval of studies conducted by different committees of the Bar Association; the commission of matters for study; recognitions to distinguished attorneys and Bar Association officers; the approval of legal services for indigents; continued legal education; legal, cultural, and social exchanges with attorneys from other jurisdictions; benefit programs for bar members; social activities; pronouncements and statements on local and foreign matters of general interest. Exhibits 46-48 (1978-1984). (For a brief summary of the agreements and resolutions of the Board of Governors from 1976 to 1982, see, *Schneider*, Exhibits 6a, pp. 17, 23; 6b, pp. 17, 23; 6c, pp. 17, 21; 6d, pp. 21, 25; 6e, pp. 19, 21; 6f, pp. 20, 22. See also Exhibits 235, 35-50.) The Bar Association's administrative operation is in charge of an Executive Director who complies with the agreements of the Board of Governors and keep the same informed of the Bar Association's opera-

tions. Tr. Ev., pp. 13-14. The Executive Director is chosen by the Board of Governors by recommendation of the President. Tr. Ev., p. 18.

Since the present President of the Bar Association, attorney Abrahan Diaz Gonzalez, took office, the Board of Governors has focused its efforts primarily on two areas. In the first place, the Board has tried to solve the problem of legal education in Puerto Rico. Through a resolution to that effect, the Board asked the Supreme Court to appoint a committee to update a study it had prepared on the bar examination. It has also made recommendations on the state of the law schools of Puerto Rico. Tr. Ev., pp. 368-369.

In the second place, the Board of Governors has taken a great deal of time to plan a legislative program which seeks the Legislature's approval of four bills dealing with the operation of the Bar Association. These bills would make a significant contribution to raising the quality of the legal profession. The first bill seeks to grant the Board of Governors of the Bar Association the power to fix, within certain parameters, the date for the General Assemblies of the institution and the election of the members of the Board and the Board of Directors of the Delegations. The second seeks to vest the Ethics Committee with the powers of inquiry had by the Legislative Committee, when dealing with the professional conduct of attorneys. The third bill seeks to increase the bond posted by notaries to secure strict compliance with their obligations from $2,500 to not less than $20,000. The fourth bill seeks to create an independent foundation to be funded with the proceeds from an increase in the price of bar and notarial stamps. The new foundation shall provide the physical and personnel resources needed by the institution to systematically review all the codes, all the bodies of law, and to make all the necessary humanistic studies with its own research staff. The current foundation of the Bar Association would be in charge of the funding, due to its tax exemptions and flexibility. Tr. Ev., pp. 369-386; Exhibit 51.

II. *Committees*

A great deal of the Bar Association's activities are held through its committees. At the time the hearings were being held before the Special Master, there were about 35 committees. A list of some of the committees with their respective chairmen was filed. Exhibit 15. Some of the committees are permanent and some are temporary. Tr. Ev., p. 278. We will describe below the activities held by some of the committees.

A. *Ethics Committee*

The Organic Act of the Bar Association, Act No. 43 of May 14, 1932, entrusts the Bar Association with two basic functions regarding professional conduct. In the first place, the Bar Association is empowered to adopt and establish, with the approval of the Supreme Court, the Canons of Ethics that shall govern the conduct of lawyers. 4 L.P.R.A. § 773(f); Tr. Ev., p. 215. In the second place, the Bar Association has the power to receive and investigate complaints on the conduct of attorneys admitted to the practice of the profession in Puerto Rico, which complaints may be referred to the Board of Directors so that, after a hearing where the respondent shall have the opportunity to be heard, if probable cause is found, the corresponding disbarment proceeding will be filed with the Supreme Court. 4 L.P.R.A. § 773(g); Tr. Ev., pp. 215-216.

Pursuant to the legislative mandate, art. 45 of the Regulations of the Bar Association has invested the Ethics Committee with the following duties regarding the conduct of attorneys:

> A — To investigate the professional conduct of bar members either on its own initiative, or at the request of the Board of Governors; and to submit the corresponding report with specific recommendations.
>
> B — To issue an opinion on its own initiative or at the request of any member of the Bar Association, on a person's

professional or judicial conduct; provided that the opinion does not deal with matters concerning judicial decisions or with the exercise of discretion by the courts. Tr. Ev., pp. 216-217.

Attorney Manlio Arraiza Donate, member of the Ethics Committee, testified before the Special Master on the complaint proceedings followed before said committee. Tr. Ev., pp. 215-241.

Any citizen having a complaint against an attorney may resort to the Bar Association and file a writing to that effect. Once the complaint is filed, it goes before the consideration of one of the Committee members. If it appears from the writing that there is a violation of the Canons of Ethics, or if from the writing it is inferred that there is ground to believe that there was a violation, the bar member is notified with a copy of the Regulations — Exhibit 37 — so that he may answer the complaint within the regulatory period. The bar member's answer is sent to the complainant so that the latter may make whatever comments he deems necessary. After receiving the respondent's answer, the Ethics Committee determines if the complaint should be dismissed or if, on the contrary, the complaint warrants the holding of a hearing. At the hearing, both parties are given ample opportunity to be represented. The Regulations even provide that if the complainant wishes to have legal representation, the Bar Association is committed to give it to him. Then the Committee makes its final decision which could be that there was no violation of the Canons of Ethics in which case the complaint is dismissed. If, on the contrary, it is found that the respondent has violated the Canons of Ethics, a report should be prepared and submitted to the Board of Governors. Before the report is submitted to the Board of Governors, both parties are notified of the same and it is approved by the full Committee. Both parties are notified of the date when the report is going to be submitted to the Board of Governors. The parties may appear on that date to defend their position. If the

Board of Governors adopts the report, the complaint is formally forwarded to the Supreme Court where the proceeding on professional conduct begins. Tr. Ev., pp. 217-220; Report of the Special Master, pp. 51-52.

The Ethics Committee is constituted by twelve members. Tr. Ev., p. 226. They are appointed by the President of the Bar Association with the unanimous advice and consent of the Board of Governors. Tr. Ev., p. 227. Although the members of the other committees of the Bar Association are also appointed by the President, the appointment of the members of the Ethics Committee requires the consent of the Board of Governors due to the delicate nature of their functions and duties. Tr. Ev., p. 227.

The Committee has a person hired under a part-time contract by the Bar Association with the exclusive function of conducting investigations, and a secretary who handles administrative procedures. Tr. Ev., pp. 361-367. Save for a two or three week recess in Christmas and the Annual Assembly week, the Committee meets every Tuesday. Sometimes it has held more meetings. Every year the Committee receives from 300 to 400 complaints from which 15 to 35 are referred to the Supreme Court. Tr. Ev., pp. 222-225.

Every year the Committee renders a report summarizing the work performed. Exhibit 37.

The July 6, 1983 report shows that the Committee has made a series of consultations on ethico-legal themes, as for example: whether or not to approve public advertising, the collection of fees for case referral, professional secret vis-a-vis section 7203 of the Federal Internal Revenue Code, and the conflict of interests in the representation of voluntary legal services. Exhibit 37; Tr. Ev., pp. 235, 237-283.

The Committee also has an orientation program for lawyers. If a lawyer has any concern with regard to a professional liability problem, he may bring it before the Bar Association. This consultation service is absolutely free for bar members. Tr. Ev., p. 471. Furthermore, the Bar Association is planning

to offer to the bar members lectures on the Canons of Professional Ethics at each of the district delegations on the island. Tr. Ev., p. 240.

B. *Legal Education and Professional Improvement Committee*

The Legal Education and Professional Improvement Committee was created to keep bar members up to date in their knowledge of the law. Tr. Ev., p. 169. Said Committee is composed of judges, law school professors and lawyers known for their excellent academic background and professional experience. Tr. Ev., pp. 168-169. At the time the hearings were held before the Special Master, the Committee was chaired by attorney Salvador Acevedo Colon. Tr. Ev., p. 168. The Committee sponsors the Institute of Practical Education, a nonprofit corporation organized in 1979 and engaged in the improvement of the legal profession. Tr. Ev., pp. 244 and 248. It has its own accounting system and an external auditor. Tr. Ev., p. 248. The members of the Legal Education and Professional Improvement Committee are the directors of the Institute. Tr. Ev., p. 172. The President of the former is also the President of the latter. Tr. Ev., p. 168. The Institute was created to give more flexibility to the achievement of the Committee's objectives. Tr. Ev., pp. 243-245.

The Committee, through the Institute, offers bar members a series of seminars, talks and lectures on the different areas of the law. Tr. Ev., p. 170. In some cases a nominal figure is charged and in other cases they are offered free of charge. Tr. Ev., pp. 24, 170-171, 188.

Among the educational activities held are:

1. Seminars for new lawyers.
2. Seminars on Damages.
3. Problems of the Law of Evidence.
4. Workshop on Estate Planning in Puerto Rico.

5. Seminar on Injunction.
6. International Seminar on the Right to Work.
7. Appellate Procedures seminar.
8. Seminars on Civil Procedure.
9. Seminars on Law Office Management.
10. Seminar on Municipal Law in coordination with the Municipal Services Administration.
11. Seminar on Social Security.
12. Seminars on Registry Law.
13. Seminar on Preliminary Hearing Procedure.
14. Seminar on the Organic Act of the Department of Consumer Affairs (DACO).
15. Seminar on the Workmen's Accident Compensation Act.
16. International Meeting of Jurists. With the participation of Professors Andres Tunk of the Center of Compared Judicial Studies of the University of Paris, Arthur Mergen, law professor at Harvard University, and Ferdinand Stund, professor at Tulane University.
17. Seminar on Appellate Procedure before the Supreme Court of Puerto Rico.
18. Seminar on the Due on Sale Clause.
19. Seminar on Tax Law.
20. Seminar on Stress Management, offered by a panel of physicians.
21. Seminar on Estate Planning and the Puerto Rico Estate Law.
22. Seminar on Personal Property.
23. Seminars on Bankruptcy.
24. Seminar on the liability of physicians who work for hospitals.
25. Seminar on Medical Malpractice.

Tr. Ev., pp. 186-202, Special Master's Report, pp. 46-48.

The Committee and the Institute also offer, twice a year, review courses for the bar examination opened to bar examination applicants. The proceeds from such courses allow the Institute to be completely self-sufficient to the point that it has even made a loan to the Bar Association. Tr. Ev., pp. 252, 255, and 257.

The Institute is organizing a review course that will cover the different areas tested by the federal bar examination to help those bar members who wish to practice law before the United States District Court for the District of Puerto Rico. Tr. Ev., pp. 175-176.

C. *Committee for the Study of the Constitutional Development*

The Committee for the Study of the Constitutional Development is constituted by attorneys from all political stands. Tr. Ev., pp. 278, 420. Among the studies it has conducted, the most important are: police corruption as a threat to the democratic system, the electorate's direct means of intervention in the political process. And the third one is the result of a series of reports on the Puerto Rican status issue. One of the reports, which was unanimously approved by the members of the Committee, recommends some minimum requirements that should be guaranteed under any status alternative. Based on these reports, the President of the Bar Association has appeared before the United Nations to present the recommendations of the Committee. Tr. Ev., pp. 278-280, 419-421; Exhibit 36.

D. *Legislation Committee*

As it can be inferred from art. 45, item 2, of the Regulations of the Bar Association, the Legislation Committee has the following functions:

(a) To be alert to all legislation proposed and which could affect or which affects the administration of justice, the practice of the legal profession, or the existence and operation of the Bar Association.

(b) To draft written reports, setting forth the grounds for recommending to the Board of Governors of the Bar Association those legislative measures it deems pertinent, preparing whatever draft bills are necessary.

(c) To cooperate with the Legislative Assembly whenever such cooperation is requested from the Bar Association. Exhibit 1; Tr. Ev., p. 137.

Besides the regulatory functions, the Committee furnishes information on pending legislation to citizens or organizations that request it. Tr. Ev., p. 138; Exhibit 39.

The Committee is composed of bar members appointed by the President of the Bar Association. Tr. Ev., p. 153. It reviews draft bills brought before the Legislature and selects those that could be of interest to the Bar Association and to the practice of the legal profession. Tr. Ev., pp. 143-145.

The Committee does not lobby for draft bills on behalf of any group or individual. The criterion used by the Legislation Committee to analyze and adopt a position with regard to a legislative piece is based on a purely legal analysis. The Committee analyzes the case law and the current laws and recommends changes. Tr. Ev., pp. 146-148.

Between November 1982 and January 1985 the Legislation Committee studied and commented from 80 to 90 legislative pieces. From these, approximately half were commented at the request of the Legislative Assembly and the other half was studied at the initiative of the Committee based on the priorities and matters of interest of the Bar Association. Tr. Ev., pp. 151, 163-164.

E. *Other Committees*

The Special Master also received reports on the work performed by other committees. See Section VI, *infra*. From among these committees we may point out the following: Evaluation of Judicial Appointments; Family Law; Criminal Law; Labor Law; Electoral Process; Public and Cultural Activities; Defense and Development of Women's Rights; Human Rights and Constitutional Rights; Committee for the Study of the Working Conditions of Attorneys in the Public Service.

III. *Legal aid to indigents*

The Bar Association was the main framer of the Voluntary Services Corporation (Pro Bono). The opportunity cropped up when the Legal Services Corporation in Washington decided to allocate a certain amount of funds to lawyer associations willing to participate directly in the aid to indigents. The main objective of the Pro Bono program is to provide free legal services to low income individuals. The program offers services in civil and juvenile cases. It also gives aid to the Carolina Center for the Elderly and to the Youth Office assigned to the Governor's Office. These two entities make financial contributions to the Pro Bono program.

The Pro Bono Program operates partially with federal funds and with the participation of voluntary attorneys of the Bar Association. Besides the original contribution made, the Bar Association makes a yearly contribution amounting to $40,000 as rent for the premises. Pro Bono uses the premises of the Bar Association and its printing services. Its Board of Directors is composed of the Executive Director of the Bar Association, two directors appointed by the President of the Bar Association, the President of the Legal Aid Committee of the Bar Association, two attorneys appointed by the Executive Director of the Legal Services Corporation and three persons elected by an assembly of clients.

More than 800 attorneys of the Bar Association participate in the Pro Bono program and since the program began it has dealt with 1,815 cases in 1982; 3,688 cases in 1983; and 5,902 cases in 1984. In recognition of its extraordinary work, the American Bar Association awarded it the "Harrison Tweed Award" in 1984. Tr. Ev., pp. 20-22; Special Master's Report, pp. 33-34. See Exhibit 3.

IV. *Publications*

The Bar Association publishes or sponsors several publications: a law review; a monthly newsletter of the activities of the Bar Association and its instrumentalities; reports of the different committees; and works and other writings of attorneys-authors.

The *Revista del Colegio de Abogados* (the Bar Association Law Review) publishes a myriad of articles on all the areas of the law. It has published articles described as "political or ideological rhetoric" that bear little relation to the works of a law review. *Schneider*, *supra*, at 969-970.[4] The Law Review sometimes publishes some of the resolutions and proceedings before the Board of Governors and the General Assembly, some of which have been labeled as ideological. *Schneider*, at 969 n.16.

Without going into the propriety of those pronouncements within the context of the remedy we will devise below, we note that the articles mentioned only represent 4, 4, and 15 percent of the total pages printed for volumes 39, 42, and 43 of the Bar Association's Law Review respectively, that is, about 7 percent of the total amount of pages published in those volumes. Said percentage necessarily decreases if we consider

[4] It referred to the following articles: Mari Bras, *La Jornada de 1978 en Naciones Unidas*, 42 Rev. C. Abo. P.R. 555-573 (1981); Aponte Vazquez, *Necator americanus: O Sobre la fisiologia del caso Rhoads*, 43 Rev. C. Abo. P.R. 117-142 (1982); Marcksoud Lopez and Serrano Garcia, *El mito de la democracia: Apuntes sobre la cultura politica puertorriquena*, 43 Rev. C. Abo. P.R. 359-401 (1982).

those volumes whose articles, as a whole, have a legal, "non-ideological" character. (See Exhibit 18; *Schneider*, Exhibits 243, 244.) Even though it was not a practice to do so, since January 1984 the Bar Association's Law Review has expressly notified the readers that it is not liable for the contents of the articles published.

The Bar Association offers an advance sheet service of the opinions of the Supreme Court of Puerto Rico. As the Court issues its opinions, the Bar Association reproduces them with a summary of the facts and syllabus. Tr. Ev., p. 29; Exhibit 24. The Bar Association mails those opinions to all the attorneys who so wish without charge. Tr. Ev., p. 30. Non-bar members who wish to subscribe to the service are charged $35 per year. Tr. Ev., p. 57.

The Bar Association sends to all bar members the Notices of the Executive Director. These notices include: (1) administrative court orders; (2) changes in the rules of the courts; (3) the resolutions approved by the Board of Governors and by the Assembly; (4) the courses and seminars offered by the Legal Education Committee and by the Institute of Practical Education; (5) the seminars on law, lectures, congresses, courses, and conventions outside Puerto Rico; (6) the state of legislation presented before the Legislature and the acts approved by the Governor bearing on the profession; and (7) the regulations recently promulgated by the different government agencies. The service of notices also includes information on employment opportunities, sale of books and offices, and information on the activities of the committees. Tr. Ev., pp. 30-32; See Exhibit 19. All bar members have access to this service.

The Bar Association collaborates with the Office of Court Administration in the publication of a new law review entitled *Forum*. Tr. Ev., pp. 33-34. This new review substitutes the old "Factum." Tr. Ev., p. 282; Exhibits 20.

The program of the Annual Assembly of bar members is another vehicle of written communication with the members. According to the Regulations the program must be published

and a copy of the same sent to all bar members notifying them of the results of the election of delegates of the District Assemblies. Art. 14, Regulations of the Bar Association. An analysis of all the programs shows that they offer valuable information to the bar members with regard to the administration and operation of the institution: financial statements, income and expenses, budget, etc. It also has a summary of the resolutions and agreements adopted by the Board of Governors during the previous year. Furthermore, it presents a brief exposition of the social, educational, and miscellaneous activities held by the Bar Association, its governing bodies and its committees assuming the activities held by the institution during the previous year. (*Schneider*, Exhibits 6a-6f.) Usually, the Annual Assembly is dedicated to a subject of interest or to a distinguished person. Exhibits 42-45. The subject or person to which or to whom the assembly is going to be dedicated is chosen by the Board of Governors of the Bar Association. Tr. Ev., pp. 393-396. In *Schneider*, *supra*, some of the covers of these programs as well as the messages of the President were labeled as ideological. *Schneider*, *supra*, at 970.

Occasionally, the Bar Association with the approval of the Board of Governors publishes the reports of its committees. (*Schneider*, Exhibits 245; 252; 253; 244, pp. 619-34; 22-24. See also Exhibits 234 and 236.) It also publishes or cosponsors the publication of works by authors who are attorneys and who make a contribution to Puerto Rican law. See Exhibit 23; (*Schneider*, Exhibit 8).

V. *Physical facilities*

In its Miramar seat, the Bar Association has its administrative offices, the office of the President, the printing office, the offices of the Ethics Committee and the Legal Education Committee, and a restaurant-bar. It also has an activities hall that seats 450 persons, the Board of Governors hall, that seats 75 persons, and the reading room. Tr. Ev., pp. 34, 41. These

last three premises, together with the lobby of the Bar Association building, are available for the use of private entities or individuals who pay a rent and comply with the rules for the rent of the Bar Association premises. Tr. Ev., p. 34; Exhibit 21.

These premises are also used by lawyers for their family and professional activities for a rent equivalent to half of what is paid by nonmembers. There is a list of organizations that have been exempted from the payment of rent by the Board of Governors, save for a minimum charge for maintenance, to wit: the Legal Services Corporation, the Legal Aid Society, the Property Registrars Association, the Catholic Attorneys Association, the Evangelist Attorneys Association, the Association of Wives of Attorneys, the Institute of Practical Education, the Bar Association Foundation, the Egida del Colegio de Abogados (Home for Retired Lawyers), the Council of Presidents, the National Association of Law Students, the Association of Attorneys Practicing before the Industrial Commission, the Notarial and Registry Law Institute, the Association of Prosecuting Attorneys, the Association of Friends and Relatives of Inmates, the Federal Bar Association, the Judicial Association, the Puerto Rico Bankruptcy Bar Association, the Comparative Law Study Center, the Luis Munoz Morales Chapter of the Law Fraternity Phi Alpha Delta, the Civil Rights Institute, the Association of Women in the Judiciary, the Association of Inter-American Alumni, the Puerto Rican Law Foundation, the Committees of the Bar Association, and the Bar Association District Delegations. Bar Association personnel is also exempted from paying rent. Tr. Ev., pp. 35-38; Exhibit 21.

The premises may be used by any person who requests it subject to the rules of order established and to the payment of the corresponding rent. Tr. Ev., pp. 38-39, 509. According to the uncontroverted testimony of the President of the Bar Association, the rent of the premises is not subject to any type of discrimination by reason of the contents of the message or the affiliation of the lessee. Tr. Ev., p. 511.

Many meetings, public hearings, and social activities of all kinds have been held in said facilities. Different groups hold their press conferences in the physical facilities of the Bar Association: labor unions, political parties, political groups, students, art organizations, social organizations, civic organizations, religious organizations, dissenting and protest groups, etc. *(Schneider*, Tr. Ev., p. 153.) Others hold their periodical or organizational meetings. These facilities are also used to hold arbitration hearings and public hearings. The social and art activities held at the Bar Association are many and varied, as for example, parties of the bar members or their relatives, concerts, plays, movie shows, graduations, balls, banquets, beauty or fashion contests, etc. Exhibit 22; *(Schneider*, Exhibits 247, 248-249; i, pp. 1-11.)

VI. **Description of the exhibits filed before the Special Master**

1. Current Regulations of the Bar Association of Puerto Rico. *(Schneider*, Exhibit 4.)

2. A photocopy of the Certificate of Incorporation of the Fundacion Colegio de Abogados de Puerto Rico, and the cover letter.

3. Report of attorney Maria Ines Cartagena Colon, Executive Director of Pro Bono, Inc., Puerto Rico Bar Association Voluntary [Legal] Services, dated January 10, 1985.

4. Articles of Incorporation of Puerto Rico Bar Association Voluntary Legal Services, also known as Pro Bono, Inc.

5. Regulations of the Bar Association Voluntary Legal Services.

6. List and amount of cases, according to subject matter, handled by Pro Bono from June 1981 to June 1982.

7. July 12, 1984 letters of the Chairman of the Standing Committee on Legal Aid and Indigent Defendants of the American Bar Association, and of Benjamin Lerner, President of the National Legal Aid and Defendants Association, addressed to Arturo Negron Garcia, Esq., President of the Bar Association.

8. A photocopy of Cornerstone, the newsletter of the National Legal Aid and Defender Association, Vol. 6, No. 4, regarding the Harrison Tweed Awards. A publication which acknowledges the award given to the Bar Association.

9. Communications presented before the Award Committee regarding the proposal for the award, and describing the merits of the proposal and the activities.

10. Bar Association press release of May 19, 1984, on the award, including a photocopy of an article entitled *The Bar Association Services the Poor* published in *El Reportero* newspaper.

11. List of attorneys who have shown an interest in voluntary legal services training.

12. Abstracts published by the Bar Association's Voluntary Legal Services, indicating the services offered, how to choose the services, the eligibility criteria, the clients' duties, and other related matters.

13. Programs and invitations for the seminars offered by Voluntary Legal Services, with a list of the same, advertisements, and other documents related to the seminars and the short courses offered.

14. Documents related to the Bar Association Institute of Practical Education with a list of the activities held by the Attorney's Legal Education and Improvement Committee from 1979 thru 1984. The invitations to the seminars and courses are attached thereto.

15. List of current Bar Association committees and their chairpersons.

16. A copy of the 1985 Bar Association budget, approved by the General Assembly held on September 4, 1984.

17. A copy of Resolution No. 1, approved by the Bar Association Assembly on September 3, 1983.

18. Summary of the table of contents of the Bar Association Law Review from 1974 to 1983.

19. Notices sent by the Executive Director to bar members from 1983 to 1984.

20. *Factum* and *La Toga* newsletters up to December 1984. Labor Law newsletters published by the Bar Association from 1981 to 1984.

21. Documents regarding the rules to rent the Bar Association premises.

22. A list of the use of facilities, which includes all the activities held by the Bar Association from 1982 to 1984.

23. Copies of the following publications by the Bar Association:

a. Regulations for executing the 1979 Mortgage and Property Registry Act, published in 1980.

b. Bar Association Legislation Services, Mortgage and Property Registry Act, Act No. 198 of August 8, 1979.—

c. *Los Abogados de Puerto Rico, Fundamento para una sociologia de la profesion legal* (The Attorneys of Puerto Rico, Grounds for the Sociology of the Legal Profession), by Jaime B. Fuster, Esq., 1984 edition. *(Schneider*, Exhibit 8.)

d. *Penal Code Commented*, 1975 edition.

e. *Procedimientos Apelativos Civiles* (Civil Appellate Procedures), by Alvaro Calderon, Jr., Esq., and David Rive Rivera, Esq., published in February 1978.

f. *Instructions to the Jury for the Superior Court of Puerto Rico*, 2d ed. 1979.

g. *Los derechos del acusado* (The Rights of the Defendant), by Ismael Betancourt y Lebron, Esq., 1975.

h. *Toga Lirica*, by Alma Delgado de Torres, Esq.

i. *La filiacion en Puerto Rico* (Filiation in Puerto Rico), by Alvaro Calderon, Jr., Esq. 1978.

j. General Index of the Puerto Rico Bar Association Legislation and Case Law Review, by Vilma Rivera de Bayron, of the University of Puerto Rico Law Library.

k. Brochures regarding the Community Legal Education Committee.

l. Rules of Civil Procedure of 1979.

m. Rules of Evidence of 1979.

n. 1959 report to the Hon. Governor of the Commonwealth of Puerto Rico, by the Committee for the Study of Civil Rights.

o. Prontuario de Etica (Handbook of Ethics), by Eliadis Orsini Zayas, Esq., 1983.

p. Handbook containing the Code of Ethics that will govern the professional conduct of attorneys in Puerto Rico.

q. Supreme Court Case Law Index from May 1981 to May 1982.

r. List of the commercial entities servicing the Bar Association, with the global discounts.

s. *America Through its Women Judges*, September 1981.

t. *The Rights of the Mentally Retarded*, September 1978.

u. *Glossary of Legal Terms for Journalists*, 1984.

v. *Historical Handbook of the Grito de Lares*, etc.

w. *Notarial Law*, revised edition, May 1981.

x. Speech delivered by the Hon. Jose Trias Monge in the 1975 Assembly of the Bar Association.

y. *Woman, Know Your Rights*, by the Committee for the Improvement of Women's Rights, June 1978.

z. *Rules of Administration for the Court of First Instance*, 1975.

aa. Speech delivered by Marcos A. Ramirez, Esq., to the Ponce 1972 Assembly.

24. Opinions of the Supreme Court of Puerto Rico circulated among bar members from 1983 to 1984.

25. Report of the Bar Association Family Law Committee on the work of the last few years. This Exhibit contains a summary of the Committee's work from 1980 thru 1984, among others: the project of community orientation entitled: *The Law Within Your Reach*, which is an effort to explain to the

citizenry, in simple terms, what are their rights and obligations under the family laws, so that citizens may, among other things, fend for themselves before the Courts. It also contains an offprint of the article published in *El Vocero* newspaper — daily issue of 206,800 copies — on September 5 and 10, 1983. The Committee conducted studies on the draft bills dealing with the rights of the children in Puerto Rico and on other Family Law legislation.

The Committee also organized a series of lectures on Family Law dealing with the condition of women, custody, and patria potestas.

26. A summary of the activities of the Public and Cultural Activities Committee. This exhibit contains a summary of the activities of the Committee from 1979 to 1984, to wit: forums, lectures, art shows, and social activities related to the profession, among others: lectures by distinguished professors of Georgetown University, collaborations with the Labor Law Committee, seminars on Lobbying, Natural Resources, Civil Rights, Unemployment, History, Women's Problems, and other cultural and professional activities.

27. A summary of the activities of the Committee for the Defense and Development of Women's Rights held between 1981 and 1984. This exhibit gives a detailed relation of the myriad meetings, forums, lectures, and seminars dealing with the problems affecting Women's Rights. It further details the appearances of the Committee before legislative public hearings regarding bills related to the works of the Committee in behalf of women. As an example of the nature of these activities it would suffice to mention:

> A. Three-day forum on *America seen through its Women Judges*, in which women judges of Venezuela, Chile, Nicaragua, United States, and Puerto Rico participated and explored the role of women in the Judicial System of their respective countries.

B. The Committee's works before the Legislature in support of bills seeking to establish day-care centers in factories and industrial centers.

C. Three-day forum on the rights of women workers. The forum was addressed to unions and women's organizations. Approximately 1,000 persons came to the forum.

D. Forums on Family Law and on Women and Literature.

28. This exhibit contains a summary of the works of the Electoral Process Committee during 1984. This Committee was created by the Board of Governors to enhance the level of political debate in our country, to enforce the laws governing the voting process and to frame a code of ethics to regulate public debate among political candidates.

The Committee, whose members are attorneys of all political persuasions, held hearings. Most of the candidates to high-ranking public offices attended these hearings. The Committee published a Code of Electoral Ethics in all the island newspapers, some of which wrote editorials congratulating the Bar Association's work and exhorting the candidates to observe the rules laid down in the Code of Ethics. The importance of this work is evinced by the participation of such entities as the Catholic Church, the Evangelical Council, the Medical Association, the Engineers' Association, the Pharmaceutical Association, the Chemists' Association, the Dentists and Dental Surgeons' Association, the Designers' Association, the Rotary Club, and the Endowment for the Humanities.

29. Report of the Committee for the Evaluation of Judicial Appointments. This exhibit contains a relation of the works of the Committee between 1979 and 1984, among others, the annual evaluation of hundreds of candidates for judgeships, appearances before the Puerto Rico Senate Appointment Committee, regarding the confirmation of judicial appointments made by the Governor.

The Committee continuously and systematically evaluates candidates to the Bench. Besides, during a judicial conference, the Committee presented a paper on *The Selection of Judges in Puerto Rico.*

30. Report of the Committee on Group Legal Plans and Insurance Committee. This exhibit relates the efforts performed from 1976 up to now regarding the establishment of a life insurance plan for bar members. Presently, each bar member has a life insurance for $15,000, entitled to double compensation in case of accidental death.

For years the Committee has been studying the possibility of establishing some prepaid group legal services plan.

31. Report of the Committee on Notarial and Registry Law from 1978 to 1984. The Committee took part in the 2nd International Congress on Mortgage Law in Madrid (1974), in the National Forum on Notarial and Registry Law in Neiva, Colombia (1976), in the 9th Panamerican Encounter in San Jose, Costa Rica (1976), in the 2nd International Congress on Mortgage Law held in Puerto Rico (1977). In 1978, 1979, and 1980, it held a series of seminars on the Mortgage Law Draft Bill and then, on the Mortgage Law and its Regulations, once approved. During these years it was engaged in several legislative endeavors related to the Mortgage Law draft bills. In 1981 it organized a series of seminars, and in 1982 and 1984 it took part in the International Congress on Mortgage Law.

32. Report of the Committee on Criminal Law. This exhibit is a summary of the work done by the Committee on Criminal Law since 1979.

In 1979, the Committee held the National Congress Against Crime. The First Meeting, held on February 7, 1979, included a series of forums and lectures on *The Impact of Mass Media on Criminality in Puerto Rico.* The Second Meeting, held on September 19, 1979, dealt with the subject *Rehabilitation* vs. *Punishment: the Function of the Penal System.* The central theme of the Third Meeting, held on October 10, 1979, was *The Known and the Unknown Criminality: A Case Study.*

The Fourth Meeting, held on October 24, 1979, revolved around the *Legal Professionals and Human Conduct*, it focused on the problem of juvenile delinquency. The Fifth Meeting had to do with *Criminal Bail and Judicial Discretion*.

From 1982 thru 1984 the Committee offered legal assistance to inmates, took care of inmates' complaints against the Correction Administration, participated in legislative hearings on draft bills dealing with Criminal Law, Criminal Procedure and Evidence Law, represented indigents before the Supreme Court, prepared a report to the Board of Governors entitled "Fixing Bail in Absentia" and advised the President of the Bar Association in the area of Criminal Law.

33. Report of the Committee on Human and Constitutional Rights from 1976 to 1984. During this period this Committee prepared a report on the *Rights of the Blind to Secret Vote*. Another report was made dealing with a complaint filed by Jehovah's Witnesses in a case in which one of the church members was subject to a blood transfusion against his will. The Committee also made another report on the practice of wire tapping by the Puerto Rico Telephone Company, and another one on the Civil Rights of the blind students of the Instituto Loaiza Cordero. It participated in several television programs touching on the legal condition of women, the constitutional right to bail, and draft bills having to do with bill posting. It appeared before the Legislative Houses to discuss several bills affecting the civil rights of the citizenry.

34. This exhibit is a summary of the work of the Labor Law Committee from 1979 to 1984. In 1979 the Committee conducted a study on the bill on the syndicalization of public employees, and heard consultations drawn by the Legal Advice Committee and by the Executive Director of the institution.

In 1980, the Committee cosponsored, together with the Committee Against Discrimination by Reason of Sex, a seminar and workshop on the problems faced by women in their workplace. It also took part in a seminar sponsored by the

Council on Education and Community Rights. In 1981, it submitted to the Legislature several reports on three (3) bills dealing with the rights of employees in case of removal from employment. In 1982 it began publishing, every three months, the *Labor Law Newsletter*. It organized a syndical conference, cosponsored a conference on the working woman and organized a seminar on Labor Law.

In 1983, it prepared a bill on the Closing Law for the Legislature of Puerto Rico; participated in a panel on the syndicalization of public employees; and testified in several legislative hearings.

In 1984, it participated in a seminar on the prosecution of labor grievanced before the courts, and on several aspects of the new labor legislation. It heard consultations on the labor legislation pending before the consideration of the Legislature and presented to the Legislature a paper on the Closing Law.

35. Committee for the Study of the Working Conditions of Attorneys in the Public Service. This exhibit contains a relation of the work performed by the Special Committee between 1976 and 1980, seeking to improve the working conditions of attorneys in the public service.

It published the following reports:

On the Guarantee of Tenure for Attorneys in the Public Service (1976); On the Recruitment, Promotion, Salaries and Salary Review Rules for Attorneys in the Public Service (1978); On Paralegal Techniques and their Role in the Government (1978); On the Uniform Compensation Act (1979); and On the Activities of the Committee which resulted in a $50 to $150 monthly salary increase for attorneys in the public service.

36. This exhibit describes the work of the Committee for the Study of the Constitutional Development of Puerto Rico from 1977 to 1984. During this period the Committee has published, among others, the following reports: Procedural Requirements for Decolonization (1977); Current Situation of the Decolonization Process in Puerto Rico and the Case of Puerto Rico before the United Nations Decolonization Com-

mittee (1979); Extrinsic Factors Affecting the Constitutional System of Puerto Rico (1981); and The Urgency of Reforming the Police Force to Protect Democracy (1984).

37. This exhibit contains a summary of the work performed by the Ethics Committee from 1976 to 1984. The report shows that hundreds of complaints were dealt with every year through systematic meetings held every week. According to the report, during this period from June 1982 to May 1984, the Committee dealt with more than 1,016 active cases involving complaints and consultations, it solved 543 matters, and left 473 pending.

The Bar Association, as a consequence of the work of the Committee, submitted 18 cases before the Supreme Court. The Committee presented another 12 cases before the Board of Governors of the institution. The Committee held 36 regular sessions, 10 special sessions, and 25 hearings, in which it dealt with 170 cases. It also published a brochure for general public orientation on professional ethics.

38. This exhibit contains the following reports presented by a series of miscellaneous committees:

a. Special report on the amendment to Rule 11 of the Rules of the Supreme Court of Puerto Rico.

b. Final report of the Committee on Restructuring of the Bar Association.

c. Report on the investigation conducted by the Committee for Jail Reform in the Humacao Jail.

ch. Preliminary Report on the Committee on the Conflict between the Residents of Vieques and the United States Navy.

d. Memorandum on the Annual Report of Work and Projects for 1985 filed by the Committee on Consumer Affairs.

e. Report of the Committee in charge of the Review of the Commerce Code.

f. Report of the activities held by the Special Committee for Producing Public Service Programs, during the period between October 17 and December 31, 1979.
g. Report of the work performed by the Organizing Committee of the 21st Conference of the Interamerican Federation of Lawyers.
h. Semiannual report of the Committee on Taxation Law, up to March 31, 1979.
i. Report of the Committee on Legal Advice to the Community.
j. Reports of the Committee for the Study and Review of the Bar Association Personnel Regulations.
k. Report of the Special Committee on Nuclear Armament and the Nuclear Arms Ban Treaty in Latin America.
l. Report of the Committee on Scholarships and Public Assistance.
ll. Report of the Committee for the Study of the Operation of the San Juan Judicial Center.
m. Report on the Appointment of a Special Committee for Investigating Press Attacks on Distinguished Lawyers.
n. Report of the Committee for the Study of the Proposed Territorial Demarcation of the San Juan and Rio Piedras Delegations.
n. Report on the works performed by the Special Committee with regard to the possibility of acquiring the Campo Chico lot in the Caguas Barrio Rio Canas to open a Vacational and Recreational Center for the Bar Association and possibly a Home for Retired Lawyers (Egida de Abogados).
o. Report of the Committee for establishing the Home for Retired Lawyers.
p. Memorandum — Report of the Committee on the Resolution in the case of Julio Irving Rodriguez Torres.
q. Letter reporting the achievements of the Committee to Help and Advise Lawyers.

r. Report on the Committee to Help and Advise Lawyers.
s. Minutes of the meeting of September 23, 1983, of the Committee on the Relationship between Judges, Prosecuting Attorneys, Registrars and Attorneys.
t. Minutes of the meeting of October 19, 1983, of the above-mentioned Committee.
u. Minutes of the November 16, 1983 meeting of the above-mentioned Committee.
v. Minutes of the December 14, 1983 meeting of the above-mentioned Committee.
w. Minutes of the January 18, 1984 meeting of the above-mentioned Committee.
x. Letter of attorney Melvin A. Padilla, dated January 13, 1984.
y. Letter of Luis V. Castro addressed to attorney Arturo Negron Garcia, of January 31, 1984.
z. Minutes of the February 16, 1984 meeting of the Committee on the Relationship between Judges, Prosecuting Attorneys, Registrars, and Attorneys.
aa. Report on an incident which allegedly took place in case No. 75-208, before the Superior Court, San Juan Part, between the Hon. Wilfredo Roberts and attorney R. R. Rivera Correa.
bb. Report of the Committee to Study the Legal Situation of the Panama Canal.
cc. Memorandum of the Committee to Seek Jobs for Unemployed Attorneys and New Bar Members.

39. This exhibit contains an outline of the work of the Legislation Committee as prepared by its chairperson, Atty. Georgina Candal Segurola, plus letters and an account of other professional activities. With regard to the work of this Committee, Atty. Candal testified broadly during the hearings held on January 22, 1985, Tr. Ev., pp. 135-166.

40. This exhibit contains a series of reports on the work of the Legal Education and Professional Improvement Committee, through its Institute of Practical Education from 1978 to 1984. It states its myriad activities, to wit: lectures, forums, and organization of review courses for the bar examination twice a year.

41. This exhibit contains a sample of the Assembly programs from 1978 to 1984.

42. This exhibit contains copies of the resolutions adopted by the General Assembly of the Bar Association of September 6, 1980, to wit:

> Resolution No. 1 — "The desirability that the Board of Governors takes steps to acquire the lot that abuts on the east with the Bar Association's property in Miramar."
> Resolution No. 2 — "To censure the indifference of the pertinent authorities towards the state of the prisons and the violation of the constitutional and human rights of inmates. It asks the Government to establish adequate security measures, humane treatment of inmates, and offers the collaboration of the Bar Association for the improvement of the prison system."
> Resolution No. 3 — "States the Bar Association's concern for the discrimination against women and expresses the Bar Association's availability to defend women's rights in all aspects of Puerto Rican life."
> Resolution No. 4 — "Recognizes the student chapter of the Bar Association represented by the National Association of Law Students."

43. This exhibit contains the report of the Resolutions Committee appointed by the President of the Bar Association, and certified copies of the nine (9) resolutions approved by the Assembly in 1982, to wit:

> Resolution No. 1 — "Asks the Board of Governors of the Bar Association to reevaluate its decision to drop from the

Inter. ational Union of the Latin Notarial Profession. It commissions the Board of Governors to reinstate the Bar Association as a member of said International Union of the Latin Notarial Profession."

Resolution No. 2 — "To create a Standing Committee of Finance, Planning, Budget and Use of Resources in the Bar Association."

Resolution No. 3 — "To censure the legislative process that culminated in the approval of acts No. 3, 4, 5, and 6 of August 12, 1982, increasing court, deed, and Property Registry fees, in a surprising manner and without holding hearings."

Resolution No. 4 — "Condemns the prohibition imposed by the government of the United States on the citizens of Puerto Rico who wanted to attend the 14th Panamerican and Caribbean games to be held in Habana, Cuba."

Resolution No. 5 — "Establishes that the office of Executive Director must be held by an attorney admitted to the practice of the profession."

Resolution No. 6 — "Asks the Secretary of Justice to investigate the allegations and alterations with regard to the minutes of the meetings held by the Institute of Puerto Rican Culture."

Resolution No. 7 — "States the Bar Association's concern for the climate of tension pervading international relations and condemns the arms race, it also expresses concern for the threat of nuclear armaments to Puerto Rico and asks for the appointment of a Committee for studying the Treaty of Tlatelolco, and the impact of nuclear weapons on the health, environment, economy, etc., of Puerto Rico."

44. This exhibit contains the resolutions adopted in the 1983 Assembly, to wit:

Resolution No. 1 — "To designate the sources of income to be used to pay life insurance expenses for bar members, to

establish that from now on said life insurance shall be paid with the proceeds from 80% of the bar stamps and from the funds coming from the remaining 20% of the bar stamps, in other words, from the total proceeds from the sale of bar stamps plus ⅔ of the funds coming from the sale of notarial stamps. If there is a surplus in the sources mentioned above, the same shall be used for the same public service purposes that by law must be paid from the proceeds from the sale of notarial stamps. This resolution provided further that if the sources of income were not sufficient to pay the life insurance premium, then whatever funds are necessary shall be taken from the proceeds from the membership dues."

Resolution No. 2 — "Asks the House of Representatives to postpone the approval of Senate Bill No. 534 — 'To regulate the practice of the notarial profession in Puerto Rico.'"

Resolution No. 3 — "Extends the recognition of the institution to colleagues Jose Portuondo y de Castro, Hector Reichard Cardona, and Pedro Mantellini for the valuable services they have rendered in behalf of the profession."

Resolution No. 4 — "Reaffirms the will of the institution that the Federal Court should be removed from Puerto Rico. Expresses the Bar Association's concern for the intemperate behavior of some of the Federal Court judges in Puerto Rico and states its concern for the way in which the conduct of such judges discredits our Supreme Court, our Legislative Assembly, and the Bar Association."

45. This exhibit contains a report of the work of the Resolutions Committee of the General Assembly held on September 7, 1984, and copies of the resolutions adopted by the Assembly, to wit:

Resolution No. 1 — "Stating the Bar Association's opposition to the appointment of the Hon. Juan R. Torruella, as

Judge of the Court of Appeals for the First Circuit, because even though his judicial actions are free from personalities and criteria foreign to the judicial process, in controversies tinged with an ideological character he cannot overcome his personal beliefs."

Resolution No. 2 — "Accepts the recommendations of the report submitted by the 'Special Committee on Nuclear Armaments and the Treaty to Ban Nuclear Arms from Latin America' and asks the Committee to continue examining all aspects of nuclear arms and installations in Puerto Rico in order to render the pertinent reports."

Resolution No. 3 — "Asks the Legislative Assembly to approve a measure to eliminate the requirement of two attesting witnesses in affidavits and to limit such requirement to the use of only one witness."

Resolution No. 5 -- "Supports Senate Bill No. 693 and House Bill No. 1024 which provides that the Office of Administrative Direction of the Property Registry be transferred to the Judicial Branch."

Resolution No. 6 — "States the institution's concern for the indiscriminate search and frisk practice of attorneys at the San Juan Judicial Center and at the United States District Court for the District of Puerto Rico."

Resolution No. 7 — "States the institution's rejection of the conduct of the Secretary of Justice, Atty. Nelson Martinez Acosta, and presses for his removal from office and for the investigation of his professional conduct by the Bar Association's Ethics Committee."

Resolution No. 8 — "Rejects the unjustified intervention of the Federal Court in the determination of eligibility of the athletes who will take part in the sports activities under the jurisdiction of Puerto Rico's Olympics Committee."

Resolution No. 10 — "Congratulates the American Bar Association, Atty. Luis F. Camacho, Atty. Arturo Negron Garcia, Atty. Jorge Segarra Olivero, Atty. Maria

Ines Cartagena, and the attorneys and employees of the Pro Bono Program for their collaboration in the success of the project which received the 'Harrison Tweed Award' in the American Bar Association's convention, held in Chicago."

46. This exhibit contains a list of the resolutions of the Board of Governors issued during the presidency of Atty. Luis F. Camacho (1980-1982).

47. This exhibit contains a relation of the resolutions issued by the Board of Governors during the presidency of Atty. Angel L. Tapia Flores (1978-1980).

48. This exhibit contains a relation of the resolutions issued by the Board of Governors during the presidency of Atty. Arturo Negron Garcia (1982-1984).

49. This exhibit contains a relation of the expenses incurred from 1977 to 1984 during the general assemblies of the Bar Association; a relation of the expenses incurred to pay the life insurance premiums of the bar members from 1981 to 1984, and contains further the total of annual expenses of the institution from 1977 to 1984. The financial information mentioned above can be summarized as follows:

Year	*Assembly Expenses*	*Life Insurance Expenses*	*Annual Disbursements***
1977	9,067.00	*	462,023.00
1978	31,097.00	*	547,574.00
1979	19,197.00	*	561,715.00
1980	23,087.00	*	781,071.00
1981	30,542.00	417,576.00	1,204,908.00
1982	33,287.00	472,403.00	1,496,995.00
1983	29,428.00	484,549.00	1,415,980.00
1984	55,453.00***	464,016.46	1,248,895.69

*During these years the life insurance was not accounted for as an expense but was reflected as a charge against the insurance fund. This fund comprised 55% of the proceeds from membership dues and 80% of the proceeds from the sale of bar stamps.

**From 1981 on, the life insurance payments for bar members were acknowledged as an expense, reason why yearly disbursements increased sharply.

***Without Auditing

50. This exhibit contains a series of documents dealing with the debt of the Foundation with the Bar Association.

51. This exhibit contains a copy of four draft bills that were part of the legislative program of the Bar Association, to wit:

(A) House Bill No. 233 which authorizes the Board of Governors to set the date for the Annual Assemblies of the Bar Association and for the elections of the District delegates.

(B) House Bill No. 232 which confers the Bar Association and its Ethics Committee additional powers to investigate complaints made with regard to the conduct of the members of the Institution in the practice of their profession.

(C) House Bill No. 231 which authorizes an increase — from $2,500 to not less than $20,000 — of the notarial bond to be posted by notaries to guarantee strict compliance with their obligations.

(D) House Bill No. 230 to create the Foundation for Legal and Humanistic Investigations of the Bar Association and for other purposes.

52. This exhibit contains a list of the expenses ($148,545.11) incurred by the Bar Association up to January 15, 1985, as a result of the proceedings in this case.

53. This exhibit contains a list of the costs of the work performed in the Bar Association printing shop, with regard to the publication of the opinions of the Supreme Court of Puerto Rico during 1984 ($85,316.79). This represents an approximate annual cost of $22.45 for the service rendered to each bar member.

54. This exhibit contains the Regulations of the Review Board of the activities of the Bar Association of Puerto Rico, as amended.

55. This exhibit contains a statement of the expenses incurred by the Bar Association between 1977 and 1984, in the publication of the Bar Association Law Review, in the publication of "Toga" or "Factum" reviews, and the cost of the appearances made by the President of the Bar Association before the United Nations by resolution of the Board of Governors of said institution. The contents of the exhibit may be summarized as follows:

Year	*Bar Association Law Review*	*Toga or Factum*	*United Nations*	*Year's Total*
1977	35,103.00	789.00	0.00	35,892.00
1978	31,030.00	7,643.20	769.89	39,443.09
1979	47,258.00	3,780.00	1,421.00	52,459.00
1980	59,021.00	11,786.00	2,049.29	72,856.29
1981	54,962.00	8,065.11	3,081.70	66,108.81
1982	55,695.00	19,579.69	3,148.53	78,423.22
1983	30,569.00	8,676.66	0.00	39,245.66
1984	0.00	3,732.17	934.06	4,666.23

Justices Negron Garcia, Rebollo Lopez, and Naveira de Rodon disqualified themselves.

APPENDIX G

IN THE SUPREME COURT OF PUERTO RICO

No. R-76-55

HUMBERTO PAGAN HERNANDEZ,
PLAINTIFF AND APPELLEE,

v.

UNIVERSITY OF PUERTO RICO,
ARTURO MORALES CARRION, *et al.*,
DEFENDANTS AND APPELLANTS.

JUDGMENT OF THE SUPERIOR COURT, SAN JUAN PART,
ABNER LIMARDO, Judge

MR. JUSTICE IRIZARRY YUNQUE delivered the opinion of the Court.

San Juan, Puerto Rico, October 16, 1978

REVIEW

The University of Puerto Rico decreed the permanent expulsion of a young student on the grounds that he had been charged with participating, on March 11, 1971, in violent acts which took place on the Rio Piedras Campus, and with having killed a state police officer. The only evidence connecting him with the facts was the testimony of a Police lieutenant. In *Pagan Hernandez* v. *Alcaide*, 102 D.P.R. 101 (1974), we decided that said evidence could not be used to prosecute the student. We concluded then that, insofar as the identification of the student was not reliable, said testimony was not admissible, and that such admission would constitute a violation of the due process of law. We must now decide whether the 1971 administrative decision ordering the expulsion of the student constitutes res judicata, barring the courts of justice from ex-

amining the sufficiency of said evidence to support the expulsion. Bearing in mind the particular facts of this case, we conclude that the administrative decision does not constitute res judicata and that the evidence is insufficient to support it.

THE FACTS

Under our consideration here is a judgment of the Superior Court, San Juan Part, ordering the immediate reinstatement of Humberto Pagan Hernandez as a regular student at the University of Puerto Rico, Rio Piedras Campus. Said judgment was the outcome of a judicial action which has the following factual background.

On March 11, 1971, the Rio Piedras Campus of the University of Puerto Rico was disturbed by violent acts caused by a student demonstration against the presence in the Campus of the military arts and tactics program known as R.O.T.C. Shortly after midday the Puerto Rico Police Department's Riot Squad, commanded by Juan B. Mercado, intervened. A shoot-out broke near the R.O.T.C. armory where a crowd of students had gathered and police major Mercado was fatally wounded.[1] On the following day, March 12, Pedro Jose Rivera, the chancellor at that time, sent a letter to student Humberto Pagan Hernandez notifying him that he had been summarily suspended as a student of the Rio Piedras Campus, and preferring the following charges against him for violating items 1, 4, 6, 7, and 10 of art. 10 of the University Students General Regulations,[2] regarding the incidents occurred on March 11:

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[1] It so appears from the transcript of the oral evidence brought before the Disciplinary Board of the University of Puerto Rico and which is included in the original record of this case.

[2] The above-cited provisions read:

> A. The following acts constitute a violation to the fundamental university rules, order, coexistence, and entail disciplinary sanctions:
>
> 1. Violations of the University Students General Regulations or of the Campus Regulations.
>
> 2. . . . . .

1. Your active participation, together with a group of students, in the riots and violent acts on the Campus that day.
2. Possession and use of a firearm with the purpose of harming others, and causing the death of a State police member.
3. Interrupting and disturbing the work and operations of the University on the said day.

The charges were aired before the Disciplinary Board of the University of Puerto Rico at hearings held from May 12 to June 30, 1971. The only evidence connecting the appellant with the charges was the testimony of Jose Rafael Atilano, first lieutenant of the Police assigned to the Riot Squad, and who participated in the events of March 11. The Board, on a three to two vote, found that the charges had been established and recommended that the student be permanently separated from the University of Puerto Rico. It was thus finally decreed by Atty. Jose R. Cancio, officer appointed by the Chancellor to decide the cases handled by the Board. Notice of this decision was duly served upon Pagan Hernandez on August 12, 1971.

Meanwhile, on March 17, 1971, a District Judge, based on the testimony of lieutenant Jose Rafael Atilano, found probable cause against Humberto Pagan Hernandez for the offenses of murder in the first degree and for the violation of

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3. .....
4. Improper or disrespectful conduct in the classroom or in the Campus.
5. .....
6. Interrupt, hamper, or disturb the regular work of the University or the celebration of duly authorized acts or functions. This rule is also applicable whenever registra-t.on *[sic]*, hampering or disturbing acts are carried out outside the Campus.
7. The holding of acts inside the University which have not been authorized by the corresponding university officers.
8. .....
9. .....
10. To maliciously damage university property.

arts. 8 and 6 of the Weapons Law. He ordered Pagan's arrest. On that same date Pagan Hernandez filed a petition for habeas corpus before the Superior Court, Hato Rey Part, where he attacked the validity of the said finding of probable cause. He was released on bail.

Lieutenant Atilano testified in the hearing on the petition for habeas corpus. His testimony, as in the hearing before the University's Disciplinary Board, was the only evidence connecting Pagan with the events of March 11. The judgment quashed the writ issued, and Pagan, through his attorneys, has appealed before us.

In the meantime, Pagan Hernandez had left Puerto Rico. He was found in Canada. The Commonwealth of Puerto Rico unsuccessfully filed an action for extradition before the courts of that country. Lieutenant Atilano went to Canada to repeat his testimony, and the Canadian lower court upheld on appeal by the Federal Court of Appeals of said country, decided that his testimony was not sufficient to support a finding of probable cause.[3] Pagan Hernandez voluntarily returned to Puerto Rico on December 1973. He was immediately arrested.

The appeal pending before us to review the habeas corpus judgment which affirmed the finding of probable cause was decided by a final judgment on May 31, 1974, reversing the judgment below. (102 D.P.R. 110.) We decided that the procedure used to identify Pagan Hernandez "was clearly tainted with nullity." The photographic identification had been made after a tip received by the Police which signalled out Pagan Hernandez as responsible for the death of major Mercado, and the photographs used, which were not shown to Pagan Hernandez' counsel for examination during the habeas corpus hearing, appeared on university student identification cards which also contained personal information. We also reiterate the pronouncements made by Mr. Justice Davila in the opinion of March 21, 1974, where he stated:

[3] The account contained in these three paragraphs stems from our record No. 0-71-223, which we have examined, and which gave rise to our decision in *Pagan Hernandez* v. *Alcaide*, 102 D.P.R. 101 (1974).

> . . . The evidence presented as to petitioner's identification is not trustworthy. If the identification of a defendant is not trustworthy, it is not admissible in evidence, question to be determined by the Court as a matter of law since it involves a violation of the due process of law. *Pagan Hernandez* v. *Alcaide*, 102 D.P.R. 101, 104 *ab initio* (1974).

After the criminal causes were thus decided, on October 1, 1974, Pagan Hernandez filed an application for readmission to the University of Puerto Rico, Rio Piedras Campus. His application was rejected and returned by the Registrar on October 7, invoking the expulsion decree of August 12, 1971. On November 26, 1974, he sent a letter to Chancellor Ismael Rodriguez Bou reproducing his application for readmission. The Chancellor answered the letter on December 9, 1974, telling him that since he had been definitely separated from the University by a final decision of the Disciplinary Board, the matter had to be "raised before the President of the University, pursuant to the 'Proceedings to file appeals before the different hierarchical levels of the university system.'" He urged Pagan Hernandez to file the corresponding appeal before the President and, to that end, he sent him a copy of the above-mentioned "Proceedings to file appeals."

On June 2, 1975, Pagan Hernandez sent a letter to the President of the University where he again requested readmission. On June 25, 1975, the President answered the letter rejecting the application on the grounds that, (1) the term to appeal had started to run from the moment the decisions of the Disciplinary Board were approved (August 12, 1971); (2) that "Item 1 of the Temporary Proceedings to File Appeals before the President of the University of Puerto Rico" fixes a fifteen-day term to seek review of the decision from the President of the University, which term starts to run from the service of notice of the decision, and which had "expired"; and (3) that the petitioner's action was barred by laches because "an absolutely

unreasonable term had elapsed, even if it started to run on December 9, 1974, date when the Chancellor of the Rio Piedras Campus served upon his counsel a copy of the rules governing these proceedings and where the pertinent term was fixed."

On September 30, 1975, he repeated his petition for readmission before the Council on Higher Education through a letter which was referred by the Executive Secretary to the Chairman of said body on October 7. Since no further action was notified to him, on December 10, 1975, Pagan Hernandez filed before the Superior Court an action against the University of Puerto Rico, its President, the Chancellor, and the Registrar of the Rio Piedras Campus, and against the Council on Higher Education, requesting readmission.

The defendants timely appeared to object the plaintiff's claim. The controversy boiled down to two issues: (1) sufficiency of the evidence brought before the Disciplinary Board to link Humberto Pagan Hernandez to the events of March 11, 1971, in view of our decision in *Pagan Hernandez* v. *Alcaide*, *supra;* and (2) whether the Board's decision constitutes res judicata thus barring this Court from passing upon the matter. These issues have been brought before us in an appeal against the judgment which refused to dismiss the claim on those arguments, and ordered plaintiff's reinstatement as a student in the University.

THE DEFENSE OF RES JUDICATA

We shall first pass upon the issue of res judicata because, if admissible, it would be unnecessary to examine the sufficiency of the evidence in the administrative sphere.

[1] The doctrine of res judicata, which is of Roman origin,[4] has its statutory basis on art. 1204 of the Civil Code (31 L.P.R.A. § 3343), which insofar as pertinent provides:

[4] *Lausell Marxuach* v. *Diaz*, 103 D.P.R. 533, 535 (1975); *Perez* v. *Bauza*, 83 P.R.R. 213, 217-218 (1961).

. . . . . .

Only a judgment obtained in a suit for revision shall be effective against the presumption of the truth of the res adjudicata.

In order that the presumption of the res adjudicata may be valid in another suit, it is necessary that, between the case decided by the sentence and that in which the same is invoked, there be the most perfect identity between the things, causes, and persons of the litigants, and their capacity as such.

. . . . . .

[2-4] In *Perez* v. *Bauza*, 83 P.R.R. 213, 217-218 (1961), we laid the grounds of said doctrine as follows: "... on the one hand, the interest of the State in terminating litigations in order that judicial issues may not be perpetuated ... and, on the other hand, the desirability of not submitting a citizen twice to the inconveniences which the litigation of the same cause entails." It is directed to vest the courts' actions with the dignity to which they are entitled. *Bolker* v. *Super. Ct.*; *Sosa, Int.*, 82 P.R.R. 785, 800 (1961). As stated by Manresa, "... the res judicata is not grounded on the judge's claim of infallibility, and much less on the intention of hiding his errors, it can be found in the very essence of judicial resolution, which would not deserve such name nor would it have any strength or consequence, if it were not thus fortified. It is therefore a direct result of the authority that necessarily accompanies the judgment, and, in an eminently pragmatic level, it is undisputedly based on the fact that, without that strength attributed to the thing adjudged, suits would never come to an end. ..." VIII-2 Manresa, *Comentarios al Codigo Civil Espanol*, 279 (Madrid, 1967). It is a rule "of fundamental and substantial justice, attended by public interest. ..." *Bolker*, *supra*.

[5] The fact of the doctrine of res judicata when applicable is that the judgment entered in a previous action bars the subquent litigation, between the same parties and on the same

cause of action and thing, of a claim which was litigated or adjudicated in the former action. *Mercado Riera* v. *Mercado Riera*, 100 P.R.R. 939, 949 (1972); *Isaac Sanchez* v. *Universal C.I.T. Credit*, 95 P.R.R. 361, 370 (1967); *Capo Sanchez* v. *Sec. of the Treasury*, 92 P.R.R. 817 (1965); *Riera* v. *Piza*, 85 P.R.R. 256, 262 (1962); *Sastre* v. *Cabrera*, 75 P.R.R. 1, 3 (1953); *Manrique* v. *Aguayo et al.*, 37 P.R.R. 314, 319 (1927).

[6] The instant case raises an issue which is new to our case law: the application of the doctrine of res judicata to administrative proceedings. There are several sides to the application of res judicata to the administrative field, to wit: (a) the application of the doctrine within the same agency, to its own decision, (b) interagency application, and (c) application between the agencies and the courts.[5] The case at bar raises this last aspect.

[7-8] There was a tendency in North American case law to absolutely reject the application of res judicata to administrative decisions. For example, see *Pearson* v. *Williams*, 202 U.S. 281 (1906), and *Churchill Tabernacle* v. *F.C.C.*, 160 F.2d 244 (1947), whose statements were used in several decisions to support the exclusion of res judicata from the administrative field. 2 Davis, *Administrative Law Treatise*, sec. 18.02 (1958). In *United States* v. *Utah Construction Co.*, 384 U.S. 394, 421-422 (1966), the Federal Supreme Court finally clarified that it would not abide by the position of not applying res judicata to administrative decision. It established that in proper cases said doctrine is applicable to administrative decisions. To that

[5] The following is a way to pose the problem of applying the doctrine of res judicata to the administrative field:

> "Res Judicata has two aspects which raise different problems in administrative law. First, there is the question of when an administrative decision can be attacked in the ordinary courts. Secondly, there arises the problem of when and by whom such a decision can be reopened and redetermined by the body which made it originally. Different considerations govern these two situations so that a decision which is *res judicata* for one of these purposes need not necessarily be treated as such in the other context." Ganz, *Estoppel and Res Judicata in Administrative Law*, 1965 Pub. L. 237.

effect, the Supreme Court stated: "... [W]e note that the result we reach is harmonious with the general principles of collateral estoppel. Occasionally courts have used language to the effect that *res judicata* principles do not apply to administrative proceedings, but such language is certainly too broad. When an administrative agency is acting in a judicial capacity and resolves disputed issues of fact properly before it which the parties have had an adequate opportunity to litigate, the courts have not hesitated to apply *res judicata* to enforce repose. *Sunshine Coal Co.* v. *Adkins*, 310 U.S. 381 (1940); *Hanover Banks* v. *United States*, 285 F.2d 455 (1961); *Fairmont Aluminum Co.* v. *Commissioner*, 22 F.2d 622 (1955); *Seatrain Lines, Inc.* v. *Pennsylvania Railroad Co.*, 207 F.2d 255 (1953); *United States* v. *Utah Construction Co.*, *supra*."

[9] These statements by the Federal Supreme Court settled the controversy of whether or not res judicata was applicable to Administrative Law. Ever since, North American case law has developed in terms of "applying res judicata when overbearing reasons are present, modifying it whenever alterations are necessary, and rejecting it whenever reasons against its application outweigh those in its favor." Davis, *Administrative Law of the Seventies*, sec. 18.01-18.06 (1976). In other words, the applicability of res judicata to the administrative field is flexible and depends on the nature of the issue brought before judicial consideration.

Let us now examine the case before us. Pagan Hernandez failed to take timely appeal from the decision of the Disciplinary Board. Although the Students Regulations did not provide for appeals from such a decision, the following regulations did provide for the University's review of his conduct: "Proceedings to file appeals for the different hierarchical levels of the university system," and the "Temporary proceedings to file appeals before the President of the University of Puerto Rico." The first one established a fifteen-day term to appeal before the Council on Higher Education from an adverse decision by the President, and the other provided a fifteen-day

term to appeal before the President from an adverse decision issued by the Chancellor. Humberto Pagan did not comply with those terms. He appealed before the President on June 2, 1975, and it was not until September 30, 1975, that he appealed to the Council on Higher Education because on June 25, 1975, the President denied his petition. However, these facts are not sufficient to justify the application of res judicata in this case so as to bar courts from passing upon the validity of the administrative decision.

[10] We have acknowledged several exceptions to the application of res judicata. In *Figueroa* v. *Municipality of San Juan*, 98 P.R.R. 523, 545 (1970), we recognized that the presumption of res judicata has well-defined exceptions at law of an equitable order. We cited *Perez* v. *Bauza*, 83 P.R.R. 213, 217-218 (1961); *Millan* v. *Caribe Motors Corp.*, 83 P.R.R. 474, 485-489 (1961); *Suarez Fuentes* v. *Superior Court*, 88 P.R.R. 133, 148 (1963); *Viera* v. *Racing Comm'n*, 81 P.R.R. 688, 699 (1960); *Tartak* v. *District Court and Cruz, Int.*, 74 P.R.R. 805, 812 (1953); *Vidal* v. *Monagas*, 66 P.R.R. 588, 599 (1946); *Riera* v. *Piza*, 85 P.R.R. 256, 267 *et seq.* (1962); *Rodriguez* v. *Heirs of Pirazzi*, 89 P.R.R. 494, 507-509 (1963); *Feliciano Ruiz* v. *Alfonso Develop. Corp.*, 96 P.R.R. 105, 110 (1968).

[11-13] Among these exceptions are those cases which are permeated by considerations of public policy.[6] The leading cases in this matter are *Perez* v. *Bauza*, *supra*, and *Millan* v. *Caribe Motors Corp.*, *supra*. The first one dealt with an action for filiation where the plaintiff was a minor who was charged with the lack of diligence of his mother and counsel.[7] We

[6] The following have also been considered exceptions to the doctrine of res judicata: a previous judgment (which was null) based on an acceptance of a claim which was null *(Vidal* v. *Monagas*, *supra)*; a previous judgment entered without jurisdiction *(Tartak* v. *Court*, *supra)*; a Superior Court judgment whose review was sought but not attained because of reasons not within the appellant's powers *(Riera* v. *Piza*, *supra)*; fraud *(Suarez Fuentes* v. *Court*, *supra)*; the ends of justice were defeated *(Feliciano Ruiz* v. *Alfonso Develop. Corp.*, *supra)*.

[7] For another action on filiation and the problem of res judicata, see *Garzot* v. *Superior Court*, 90 P.R.R. 351 (1961).

stated that courts have refused to be inflexible when applying res judicata whenever its application would defeat the ends of justice, specially in the presence of public policy considerations. And we added (p. 219): "As already stated, the doctrine rests upon the basic principle that there should be an end to litigation, but if the rigid application thereof would in practice defeat a right permeated in some way with public interest, the courts are inclined to a solution which would guarantee proper justice instead of rigidly applying a fiction of law which rests fundamentally upon a principle of convenience and procedural order. . . . In other words, the rule is not absolute and should always be weighed with the equally salutary principle that justice should be done in every case."

In *Millan* v. *Caribe Motors Corp.*, *supra*, we affirmed a judgment which favored the plaintiff in an action for rescission of a conditional sales contract of a truck and which granted damages, after the seller repossessed the truck because of default in the payments agreed upon in the contract. In said case, the purchaser's consent was vitiated by dolus, the contract had formal defects which violated the Conditional Sales Act, and the first action (a repossession proceeding) had a special and summary character. Hence, this would not allow for inflexibly requiring that causes foreign to the repossession be litigated. We stated, at p. 488: "Certainly there is an interest, individual as well as social, in putting an end to the litigation. Yet, we cannot defeat justice in the name of rules which were adopted for the purpose of facilitating its administration."

[14-15] The appellee invokes his constitutional right to an education under Sec. 5 of the Bill of Rights of the Constitution of the Commonwealth, which states: "Every person has the right to an education which shall be directed to the full development of the human personality and to the strengthening of respect for human rights and fundamental freedoms."[8] This

[8] "Among the rights which in the 20th Century have become a fundamental part of democratic liberalism, the right to education is consubstantially equal to the right to liberty, which is not merely the absence of external restrictions but the positive expression of human potentials. Education is the

issue cannot be dismissed with the argument that appellee had waived such right because he did not comply with the terms provided by the administrative regulations. Waivers of fundamental rights are never presumed. *F.S.E.* v. *Comision Industrial*, 105 P.R.R. 261 (1976). These should be "express, never presumed, and voluntary and performed with full consciousness." *Pueblo* v. *Arcelay Galan*, 102 D.P.R. 409, 415 (1974); *People* v. *Morales Romero*, 100 P.R.R. 434 (1972).

[16-17] The mere invocation of a constitutional right against an administrative act is not a key which would automatically move us to reject the presumption of res judicata. It is necessary to inquire into the circumstances present in each particular case. We are dealing here with a young university student with high marks,[9] whom an administrative decision has deprived of continuing his studies at the University of Puerto Rico on the basis of evidence which, in *Pagan Hernandez* v. *Alcaide*, *supra*, we deemed insufficient, suggestive, and unreliable to put him to trial. If we refuse to examine the sufficiency of said evidence to justify appellee's permanent suspension as a student of the University of Puerto Rico grounded on the doctrine of res judicata, we would be imposing upon this Court a technical self-restriction which we must overcome in furtherance of justice.

[18] Lastly, the conclusiveness of the administrative decision in this case is dubious. As it was correctly concluded by the Superior Court, there was an institutional confusion in the administrative sphere with regard to the regulations on review procedures by the President of the University and by the Council on Higher Education. It would be absurd to demand

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cultivation of the personality directed to extract from it humanity in its highest possible manifestation." Munoz Amato, *El derecho a la educacion y a la libertad academica*, 24 Rev. C. Abo. P.R. 463, 468 (1964).

[9] The record before us shows that Pagan Hernandez had an academic index of 3.4 which, if kept until his graduation, would mean that he would graduate with high honors.

from appellee strict compliance with an obscure and ambiguous administrative proceeding.[10]

SUFFICIENCY OF THE EVIDENCE

The court a quo based its determination of insufficiency of the evidence on the fact that Lieutenant Atilano's testimony had to be excluded and, once it had been excluded, there was no evidence to connect Humberto Pagan with the person who fired a weapon against and killed Major Mercado. As stated above, in *Pagan Hernandez* v. *Alcaide*, 102 D.P.R. 101 (1974), we held that said testimony was inadmissible to support a finding of probable cause because it was insufficient, suggestive, and unreliable, and that the admission of said testimony violated the due process of law.

Let us now examine the subsequent development of the due process doctrine regarding its application to university students. Traditionally, universities have enjoyed a great deal of autonomy in matters of students' admission and discipline. Keller & Meskill, *Students Rights and Due Process*, 3 J. L. & Educ. 389 (1974). This autonomy existed largely on the basis that universities were believed to be the experts in their field and not open to a review by the courts. Keller & Meskill, *id.*; Rabban, *Judicial Review of the University-Student Relationship, Expulsion and Governance*, 26 Stan. L. Rev. 95 (1973). The courts felt that the relationship between the student and the university was unique and particular, and that only the university had the expertise and sensitivity necessary to regulate admissions and suspensions, expulsion, and other student

[10] By the date the Disciplinary Board issued its decision and when it was ratified by Atty. Cancio, the regulations in force governing hearings before the Board and before Atty. Cancio did not provide the requirements to appeal from the decision of the Board or of the Chancellor's representative. They contained nothing to that effect. Three years after Pagan was suspended, the Council on Higher Education approved the Temporary procedure to appeal before the President. Although the latter had been adopted by the President during academic year 1966-67, and was used by him, it was not ratified by the Council on Higher Education until August 9, 1974.

disciplinary proceedings, in order to insure an adequate atmosphere for learning. Keller & Meskili, *supra* at 389-390.

Courts had developed several theories to define the legal status of the student vis-a-vis that of the university. One of those was the in loco parentis rule, that is, the university played the role of "substitute father," with the discretionary authority to control the student just as if it were his father. Keller & Meskill, *supra* at 390. In the late 19th Century, this doctrine began to lose ground before the contract theory. This usually applied to private universities and, according to it, the regulations published by the university constituted the conditions upon which the student's graduation was predicated. Rabban, *supra* at 97. The University would provide instruction and credentials and the student would comply with disciplinary and academic standards. Rabban, *supra* at 97. If a student violated the regulations, he breached his contract and was subject to expulsion. Rabban, *supra* at 97.

With regard to public universities, state courts held that the university had the discretional power to establish whatever regulations they deemed necessary. Rabban, *supra* at 98. The courts would only intervene when the actions of the university were unreasonable. Rabban, *supra* at 98. Federal courts held that higher education was a privilege granted by the State and not protected by the 14th Amendment. Rabban, *supra* at 97-98.

The pragmatic result of these doctrines was that the courts conferred a virtually dictatorial power upon the universities and would only intervene if the student's expulsion was arbitrary or unreasonable. Rabban, *supra* at 98. It was not necessary to hold a hearing for suspending or expelling a student. Keller & Meskill, *supra* at 391. This was the general rule governing before the sixties, until *Dixon* v. *Alabama State Board of Education*, 294 F.2d 150 (1961), *cert. denied*, 368 U.S. 930 (1901). Keller & Meskill, *supra* at 391-392.

[19] In *Dixon*, a group of black students were expelled from an Alabama State college without notice, hearing, nor

opportunity to appeal. The Federal Court of Appeals held that a state-supported educational institution is analogous to an administrative agency and that, "whenever a governmental body acts so to injure an individual, the Constitution requires that the act be consonant with due process of law." 294 F.2d 150, 155 (1961), *cert. denied*, 368 U.S. 930 (1961). This decision extended to public university students the due process and equal protection clauses of the 14th Amendment. It established that due process requires notice, preferment of charges, and hearing before a student is expelled for misconduct.

[20] Although *Dixon* dealt with the expulsion of college students, later decisions have applied the requirements of notice and hearing to public high-school students facing suspension or expulsion. Stolz, *Due Process for Students — New Developments*, 43 Fordham L. Rev. 1011, 1012-1013 (1975). Ever since *Dixon*, lower federal courts have been requiring procedural due process in cases of suspension and expulsion of students in public high schools and colleges. Stolz, *supra* at 1011. *Goss* v. *Lopez*, 419 U.S. 565 (1975).

[21] The extension of the protections offered by procedural due process in lower federal court cases has varied according to the circumstances of each case. Stolz, *supra* at 1013, n.19. The most extensive protections given to a student up to that moment, were offered in *Givens* v. *Poe*, 346 F.Supp. 202, 209 (1972), where the court required notice, hearing, the right to examine adverse education, and to present evidence, to cross examine adverse evidence, to have a record kept of the proceedings, to be represented by counsel, to be judged by an impartial tribunal, and to have the decision based upon "substantial evidence." Another example of the protection offered by procedural due process to students in disciplinary proceedings is *De Jesus* v. *Penberthy*, 344 F.Supp. 70, 75-76 (1972), where a hearsay testimony was not admitted to ground a disciplinary expulsion since the use of that testimony violated due process because the student was expelled without the opportunity to cross-examine the adverse witness.

[22-23] As we have seen, due process in the student disciplinary field is not rigid or inflexible. It has been broadened whenever the circumstances of the case have so warranted. However, we cannot affirm that the rules governing criminal prosecutions can be applied in absolute terms to disciplinary administrative actions. We cannot make such application indiscriminately. The grounds and purposes of each criminal rule intended for administrative application should be analyzed. Also the purpose and consequences of the administrative process to which rules of criminal origin may be applied must be examined. It is only applicable when the ends or grounds of the criminal rule have the same purpose in the administrative process, and if application thereof does not lead to administrative chaos. Let us now examine the following examples of the application of criminal law concepts to Administrative Law in other jurisdictions.

[24-25] In *Patty* v. *Board of Medical Examiners*, 508 P.2d 1121 (1973), the California Supreme Court ruled that the entrapment defense was available in administrative proceedings where revocation or suspension of a license to practice a profession or business was at issue, because it was as necessary in such proceedings as in criminal prosecutions. Besides California, a significant number of states have recognized the applicability of the entrapment defense to administrative proceedings where revocation or suspension of a license to practice a profession, trade, or business is at issue. Kaufmann, *Entrapment Defense is Available in Administrative Proceedings*, 7 Loyola U. L. Rev. (L. A.) 187, 191 (1974). To this effect, see *Jones* v. *Dental Commission*, 145 A. 570, 571 (1929) (Connecticut), which dealt with the revocation of a dental technician's licence; *Peters* v. *Brown*, 55 So.2d 334, 336 (1951) (Florida), where a petition for injunction was filed against the unlawful practice of dentistry; *In re Davidson*, 186 P.2d 354, 357 (1947) (Nevada), disbarment; *Langdon* v. *Board of Liquor Control*, 130 N.E.2d 430, 431-432 (1954) (Ohio), revocation of a liquor licence; *In re Horwitz*, 196 N.E. 208, 213-214 (1935)

(Illinois), disbarment proceeding; *Roberts* v. *Illinois Liquor Control Comm'n*, 206 N.E.2d 799, 802-803 (1965) (Illinois), revocation of a liquor licence; and *Ray* v. *Board of Liquor Control*, 154 N.E.2d 89, 89-90 (1957) (Ohio), suspension of liquor licence. In our jurisdiction, in *In re De Castro*, 100 P.R.R. 182 (1971), we accepted the argument of self-defense in a disciplinary action against a judge who was charged with assault and with participating in a fight.

[26] It has been ruled that it lies to exclude evidence obtained in violation of the Fourth Amendment of the U.S. Constitution in administrative and civil actions which share some of the objectives of a criminal trial, specifically those where a State agency may impose a penalty or sanction, or where revocation of a licence is sought, or in actions with a punitive purpose. Shazer, *Evidence — Exclusionary Rules of Criminal Law Are Not Part of Administrative Due Process in State Bar Disciplinary Proceedings*, 15 Santa Clara Law, 485, 487-488 (1975). For example, see: *One 1958 Plymouth Sedan* v. *Pennsylvania*, 380 U.S. 693 (1965), where an automobile was seized and the U.S. Supreme Court held that, although forfeiture is classified as a civil action, its object is to punish the commission of a criminal offense and impose a penalty, thus making the Fourth Amendment exclusionary privilege applicable; *People* v. *Reulman*, 396 P.2d 706, 709 (1964), where the California Supreme Court decided that the evidence obtained through an illegal search should be excluded in a forfeiture action because such action, although civil in nature, has purposes identical to those of criminal prosecutions, and the same exclusionary rules should apply whenever the State's misconduct is directed either to deprive a person of his liberty or of his property; *People* v. *Moore*, 446 P.2d 800 (1968), held that illegally seized evidence was inadmissible in a narcotics conviction proceeding to confine an addict in an institution for treatment, which proceeding is of a civil nature, insofar as the proceeding could imply for the defendant the deprivation of his liberty; *Elder* v. *Board of Medical Examiners*, 50 Cal. Rptr.

304, 315 (1966), *cert. denied*, 385 U.S. 1001 (1966), where the California Court of Appeals assumed that the exclusionary rule of evidence grounded on the Fourth Amendment of the U.S. Constitution was applicable to proceedings before the Board of Medical Examiners when they had the purpose of depriving a doctor of his licence; *Knoll Associates, Inc.* v. *F.T.C.*, 397 F.2d 530 (1968), where documents offered as evidence in an action against a corporation brought before the Federal Trade Commission were excluded because they had been stolen with the purpose of presenting them as evidence, in violation of the Fourth Amendment; *Rogers* v. *United States*, 97 F.2d 691 (1938), a civil action brought by the U.S. Treasury, to recover taxes on imported liquor; *Lassof* v. *Gray*, 207 F.Supp. 843 (1962), a civil action by a taxpayer to recover taxes; *Carlisle* v. *State*, 163 So.2d 596 (1964) (Alabama), where the State petitioned an injunction to bar the defendant from gambling in his business establishment; and *Finn's Liquor Shop, Inc.* v. *State Liquor Authority*, 294 N.Y.S.2d 592 (1968), which dealt with a suspension of a liquor licence.

Finally, in *Smyth* v. *Lubbers*, 398 F.Supp. 777 (1975), several college officers made a search in the dormitories of some students without having search or seizure warrants. They found marihuana and, after the pertinent disciplinary administrative proceedings, two of the students were suspended for possession of marihuana. The Federal District Court held that the marihuana seized was inadmissible in the disciplinary proceeding because it had been obtained through an illegal search. The Fourth Amendment was applicable in this case because the marihuana was discovered during the search of a room of a particular student who was a suspect of illegal activities. Insofar as the student was in the same position as a suspect of a crime, it was necessary to obtain a search warrant before searching his room. Since the search was illegal, the evidence seized was inadmissible.

In the case at bar, the only evidence connecting the appellee with the events at the University, and which grounds the

administrative decision, is the testimony of Lieutenant Atilano, member of the Puerto Rico Police. This testimony was the same one we examined in *Pagan Hernandez* v. *Alcaide*, *supra*, and that we summarized as follows (pp. 106-107).

> Because of a violent student protest in the precincts of the University of Puerto Rico, the intervention of the state police was requested. Forty-two agents of the specialized reserve unit — riot squad — under the command of Commander Mercado answered the call. Upon arriving they found a group of riotous persons attacking the building where the R.O.T.C. was located, and around the building known as Centro Universitario.
>
> After the events, six policemen had been wounded by bullets. Commander Mercado was killed as a result of a bullet wound. The second in command, Lieutenant Atilano, identified Humberto Pagan as the person responsible for having fired the deadly weapon. He testified that being at an approximate distance of fifty steps from the monument to Miguel de Unamuno, a sergeant informed him that they were firing and that they had reached him in the ankle. At that same moment he became aware that Mercado, ten steps from him, and forty from the monument, was staggering. Instinctively he looked towards the monument and observed a person firing in the direction towards Mercado. Upon describing said person he limits himself to express that he was "an individual more or less five feet nine inches tall, white, with sideburns." He also testified that at that moment he heard several detonations coming "from the trees thus from the front and at the same time from the monument." He used the word "skirmish" *(balacera)* to describe the situation that he witnessed. The witness started to get closer to the monument but the person that he had seen firing, stepped back and mingled with the multitude. He was able to observe him only at that moment at a distance of thirty-five steps

(70 feet). Under these circumstances, observing at 75 feet from the monument, at moments of tension, nervousness, and deep worry, it is difficult, if not impossible, to recognize a person and there arise serious doubts as to the reliability of the identification. And we have already seen that upon describing him he gives very few details. There is no other evidence that situates the petitioner in the surroundings of the place where the events occurred.

On the following day, as a result of a tip received by the police, Lieutenant Atilano, at the C.I.C. quarters, identified appellee from among a number of university student identification cards which contained, besides the photographs, each student's name and other personal information.

[27] In view of the short time Lieutenant Atilano had to observe Humberto Pagan, the circumstances in which he observed him — a student riot, a shootout between the police and the students, the person identified was partially hidden behind a monument, there was a considerable distance between them, and he could only see him for a fraction of a second in the midst of the shootout — the testimony of Lieutenant Atilano and his identification of the appellee through photographs is not reliable, and was obtained in violation of the due process of law to bring the criminal action and, hence, was inadmissible. *Pagan Hernandez* v. *Alcaide*, *supra*. These same reasons force us to exclude that testimony from the administrative proceeding under our consideration. Said rules are applicable herein insofar as the university disciplinary proceeding had a punitive purpose through which the appellee was deprived of his constitutional right to education. Just as the court a quo, we do not deem it necessary to enumerate here the rules governing identification procedures in cases involving discipline of university students. We simply reject the proceeding followed in the instant case because it is devoid of constitutional guarantees. We conclude, then, that the first error was not committed.

[28] The result we have reached herein does not contradict the following cases: *Mundo* v. *Tribunal Superior*, 101 D.P.R. 302 (1973); *In re De Castro*, 100 P.R.R. 182 (1971); *Velez* v. *Secretary of Education*, 86 P.R.R. 717 (1962); and *Cruz* v. *Garrido, Commissioner*, 58 P.R.R. 655 (1941). In those cases, the persons submitted to disciplinary administrative proceedings argued that the courts had acquitted them in the criminal cases filed against them for the same facts which prompted the administrative proceedings. In other words, the issue was that the fact that a person had been tried and acquitted in a criminal case barred the preferment of administrative charges against him, and the subsequent disciplinary administrative proceeding. We rejected such contention and we ratify it now. Criminal acquittal does not confer administrative immunity.

[29-30] The case at bar does not pose a claim for immunity based on a previous criminal acquittal, but a constitutional attack to the evidence of identification examined by the administrative agency. We should also note that Pagan Hernandez was not tried and acquitted by a court for the offenses charged. It is a well-known fact that in a criminal action guilt must be shown beyond a reasonable doubt, which rule has not been imposed on administrative actions. What we held in *Pagan Hernandez* v. *Alcaide*, *supra*, was that there was no probable cause to put appellee to trial. If evidence was insufficient to that end, it cannot be sufficient to support a decree of permanent expulsion from the University, depriving him of his constitutional right to obtain higher education at a State University.

The judgment of the Superior Court shall be affirmed.

IN THE SUPREME COURT OF PUERTO RICO

No. R-76-55

HUMBERTO PAGAN HERNANDEZ,
PLAINTIFF AND APPELLEE,

v.

UNIVERSITY OF PUERTO RICO,
ARTURO MORALES CARRION, *et al.*,
DEFENDANTS AND APPELLANTS.

JUDGMENT OF THE SUPERIOR COURT, SAN JUAN PART,
ABNER LIMARDO, Judge

MR. JUSTICE RIGAU, dissenting.

San Juan, Puerto Rico, October 16, 1978

REVIEW

I have to dissent, and I think I should give an explanation. I will try to be as brief and as clear as possible.[1] I dissent, but of course, I respect the opinion of the majority and I recognize the good intentions and honesty characterizing our distinguished and highly capable brother justice who wrote the majority opinion.

I

In the criminal action prosecuted against the appellant, he succeeded because the Court decided that the admission in evidence of his identification violated the due process of law. A different situation is raised here.

[1] I agree with Gracian when he says that if a writing is bad but brief, it is not so bad, and if it is good and brief, it is twice as good. In the case of judicial opinions — which is an inherently tedious literature which must be read by judges, attorneys, law professors and students — Gracian's concept could not be more appropriate.

I do not think that we are dealing here merely with whether Humberto Pagan must be reinstated as student of the University of Puerto Rico. If such were the case, I would not bother you with my dissent. I think that the issue here is the quality of college life and the rules that should govern it.

Should we conceive the university campus as a place particularly consecrated by society (at an annual cost of millions of dollars to our slim economy) to serve as a house of studies, where the greatest freedom of thought, scientific research, and study must prevail, and not the law of the West, or should we conceive it as a microcosmos of the sinful metropolis where personal unsafety is the supreme rule and crime and aggression have become such an important part of the panorama that modern architecture must not only foresee the severity of the weather but also night and day burglary?[2]

Let us not turn the University into a copy of our urban life, which has so little urbanity. Remember that when the European unity was broken at the beginning of the Middle Ages, while noblemen, craving for power, turned into war chieftains and sacked the fields and burned the towns faring war against each other, it was in the monasteries and in the studies of wisemen where the seed of culture was saved and kept until it splendidly bloomed in the Renaissance. Contemporary universities have inherited that mission.

II

The majority opinion is a very learned and informative document but I think it is disconnected from our reality. Also, its length and the many citations make the reader experienced in these matters think that something alive lurks under all that inert matter. What happens is that in intellectual and spiritual functions, such as that of administering justice, quantity is not quite relevant because we are dealing with conscience.

[2] Iron works, key-controlled elevators, electric alarms, intercommunication systems between the building's lobby and the apartment, private watchmen, closed circuit television, etc.

We should not be impressed by all those citations, specially by the case law, since these are just juridical anecdotes which have no bearing on the case at bar. For example, the case cited therein which most resembles the present controversy is that of *Dixon*, 294 F.2d 150 (1961), which deals with some students belonging to a minority group who were expelled from the Alabama State University without notice, hearing, or opportunity to appeal. That was not the proceeding followed in the instant case. In addition to this, the really important difference between both cases is their background. Interracial relations in the Deep South of the United States were notorious. The frequent abuses committed by white policemen and sheriffs, both state and municipal, forced federal courts to go all the way to the opposite extreme to protect those who needed urgent protection. Puerto Rico has not lived through that historical situation. However, contrary to that of Alabama, the historical situation which gives rise to this case is indeed ours.

Excluding me, the jurist who works in a Supreme Court and who handles Law with security is enlightened, not governed, by the case law. It is a well-known fact that Justice Oliver Wendell Holmes, Jr., one of the most sensitive and cultivated spirits of North American judicature, considered case law as the "small change" of the law — *Collected Legal Papers* (1920) p. 300. Professor Wigmore's opinion of the same was not much better. See the serious and specific criticism of casuistic law he makes in Wigmore, *On Evidence*, § 8a(I)(A) (3d ed. 1940).

The library of this Court has more than 60,000 entries. I am sure that thousands of citations can be found to support both the opinion of the majority, and my own. I have no doubt that this would be a futile task.

As we said above, we are dealing here, in part, with whether the University could suspend or expel Pagan as student. The unrebutted evidence showed that, on the day of the events, appellee had a gun in his hands while, in his capacity as a student, he was participating in a university campus riot.

The majority opinion deprives the University of the right to expel him on that ground, which is tantamount to giving university students the right to walk around the campus carrying firearms. This would bring about the disastrous decay of the peaceful life of any community and, particularly, of the university community. This would create an atmosphere of terror in said campus and would endanger the lives of professors and students. Illegally used or carried firearms are a negation of what university life should be. The University cannot be governed by the terror of politics or by the politics of terror.

The University is the house of studies par excellence and its primary values should be moral quality and intellectual competition. The University needs a peaceful atmosphere, and although the most different ideas should be tolerated, violence can never be accepted. Violence destroys university life. If this life should subsist we hope that students carry books and not weapons in the campus.

Since this case is much different from the criminal action mentioned above, and since the values involved are also different although not less important for the successful existence of university life, I deem that the University had and has the power to expel students it indeed exercised. In *Pagan Hernandez* v. *Alcaide*, 102 D.P.R. 101 (1974), the Court recognized all the possible and theoretical rights of the appellee. In this occasion the least we can do is to recognize the University's basic and elementary right to life.

To its life as a free institution, having no self-interest, but interested in creating and fostering in its professors and students intellectual tolerance and the unending search for truth and learning. Puerto Rico must make haste and increase its share of scholars and learned men and must decrease its heavy parcel of troublemakers who disrupt university peace. These take almost no time to bloom, but the education of a learned man may take from 60 to 70 years. Hence, this task should be immediately undertaken.

IN THE SUPREME COURT OF PUERTO RICO

No. R-76-55

HUMBERTO PAGAN HERNANDEZ,
PLAINTIFF AND APPELLEE,

v.

UNIVERSITY OF PUERTO RICO,
ARTURO MORALES CARRION, *et al.*,
DEFENDANTS AND APPELLANTS.

REVIEW

MR. JUSTICE DIAZ CRUZ, with whom MR. JUSTICE MARTIN joins, dissenting.

San Juan, Puerto Rico, October 16, 1978

The opinion of the majority invokes for the appellee, who was expelled for serious offenses from the University of Puerto Rico, considerations of public order which exceptionally exclude the bar of res judicata and, hence, equates the appellee's position with that of a minor who attempts to recover his filiation[1] disregarded by his mother and his attorneys. That case was decided in favor of the minor in order to prevent the defeat of justice in a case permeated by "public interest." Its ruling turns against the opinion which cites it insofar as once an adult student is separated from a State University, followed by the due process of plenary suit wherein serious offenses against the peace and order of the campus were shown, it is obvious that the values of justice and "public interest" which must be protected are not those of the appellee, but those of the thousands of students and professors who are part of the academic community, and the people's hope in its progress

[1] *Perez* v. *Bauza*, 83 P.R.R. 213 (1961).

and welfare sponsored by the higher education of its children. The exaggerated praise of the individual rights of a violator of the academic order who has been adjudged and punished is an incomprehensible disregard to our University's right to subsist.

The appellee had a generous and even paternalist opportunity to attack the charges before the University's administrative organisms, which he declined without any reason. It does not lie to intervene with the conclusiveness and integrity of the administrative proceeding, affirmed by this Court way before *United States* v. *Utah Constr. & Min. Co.*, 384 U.S. 394, 421 (1966),[2] in *Commissioner of Labor* v. *South P.R. Sugar Co.*, 73 P.R.R. 151, 157 (1952), and in *Caguas Bus Line* v. *Commissioner of Labor*, 73 P.R.R. 690, 695-696 (1952), where, citing Justice Snyder, we held that once the administrative decision is final and unappealable, a party cannot make a collateral attack[3] in another proceeding raising new issues, including constitutional questions, which the original proceeding could but did not raise. I do not see any reason why we should abandon our case law, being it well grounded on the principle adopted by the Federal Supreme Court in *Utah Constr. & Min. Co.*, *supra*, through lower courts' decisions

[2] The Federal Supreme Court text is illuminating:

> "... we note that the result we reach is harmonious with general principles of collateral estoppel. Occasionally courts have used language to the effect that res judicata principles do not apply to administrative proceedings, but such language is certainly too broad. When an administrative agency is acting in a judicial capacity and resolves disputed issues of fact properly before it which the parties have had an adequate opportunity to litigate, the courts have not hesitated to apply res judicata to enforce repose. (Citations) ... There is, therefore, neither need nor justification for a second evidentiary hearing on these matters already resolved as between these two parties." *United States* v. *Utah Constr. & Min. Co.*, *supra* at 421.

[3] Collateral remedies are not available. *Asoc. de Distribuidores* v. *Econ. Stab. Adm.*, 81 P.R.R. 206 (1959); *Concepcion* v. *Board of Accountancy*, 80 P.R.R. 190 (1958); *Commissioner of Labor* v. *Llamas*, 73 P.R.R. 847 (1952). This Court has held that it even lacks jurisdiction to review an administrative decision if the proceeding is not complied with. *Heirs of Garcia* v. *Planning Board*, 70 P.R.R. 692 (1949); *Mari* v. *Planning Board*, 66 P.R.R. 353 (1946); *Rodriguez* v. *Industrial Commission*, 61 P.R.R. 215 (1942).

cited in the opinion. The valid administrative proceeding followed by the University against the appellee has the dignity and effect of res judicata, and can be opposed to the civil action object of this review.

II

The untimely attack on the evidence of appellee's identification brought in an administrative proceeding does not raise a constitutional issue. Besides the fact that the grounds for the majority opinion in *Pagan Hernandez* v. *Alcaide*, 102 D.P.R. 101 (1974) have been overruled by this Court on subsequent doctrines on criminal identification in *Pueblo* v. *Suarez Sanchez* (on reconsideration), 103 D.P.R. 19 (1974), and in *Pueblo* v. *Peterson Pietersz*, 107 D.P.R. 172 (1978), in the end the justice, writer of the opinion, himself recognizes the independence and separation between the criminal prosecution and the administrative proceeding to the point that not even the eminent contents of justice in an absolute verdict bars administrative sanction. *Cruz* v. *Garrido, Commissioner*, 58 P.R.R. 655 (1941); *In re De Castro*, 100 P.R.R. 182, 185 (1971); *Mundo* v. *Tribunal Superior*, 101 D.P.R. 302, 304 (1973); *Velez* v. *Secretary of Education*, 86 P.R.R. 717, 720 (1962).

In view of the aforesaid, I deem that the judgment below should be reversed.

APPENDIX H

IN THE SUPREME COURT OF PUERTO RICO

No. R-80-239

A & P General Contractors, Inc.,
plaintiff and appellee,

v.

Asociacion Cana, Inc., Insurance Company of North America, Banco Credito y Ahorro Ponceno, substituted by Federal Deposit Insurance Corp.,
defendants, and appellant
the latter,
Insurance Company of America,
cross-claimant,
Banco Credito y Ahorro Ponceno,
substituted by Federal Deposit Insurance Corp.,
cross-defendant.

REVIEW

Mr. Justice Negron Garcia delivered the opinion of the Court.

San Juan, Puerto Rico, March 13, 1981

The facts giving rise to this exceptional controversy go back to January 1972, when *A & P General Contractors, Inc.* sued, among others, *Banco Credito y Ahorro Ponceno* alleging that in 1971, the said bank, after having granted it two lines of credit for $350,000.00 and $250,000.00, respectively, which were secured by a guaranty and promissory notes signed by its directors, agreed to grant it a third line of credit for $358,-000.00 secured by a $450,000.00 *mortgage note to the bearer*

taken out by *M.A.R. Development Corp.* that was to mature at presentation, but that notwithstanding this, the bank refused to allow any withdrawals upon said additional credit. As a result thereof, plaintiff was unable to finish the construction of the multi-story building *Santa Maria II*, for which it had obtained said line of credit, and this caused it damages, losses, and the expenses claimed.

In its answer, the bank and its successor, Federal Deposit Insurance Corporation (FDIC), denied that the parties' intention had been to establish a third and additional line of credit, alleging that what they sought was an additional security for the existing debt. It filed a counterclaim for the outstanding loans.

A & P General Contractors successfully asserted the doctrine of collateral estoppel by judgment against the bank and against the FDIC. It claimed that they were estopped from rebutting its allegations that the bank had established the third line of credit and had breached its contractual obligation. It used as ground the final and unappealable judgment rendered by the San Juan Superior Court on June 15, 1977, in Civil Case No. 73-8303, *M.A.R. Development Corp.* v. *Banco Credito* v. *Ahorro Ponceno*. We proceed to review.

I

For a full understanding of the question, we must examine and determine, even if in a cursory manner, the outline of the controversy in the case brought by *M.A.R. Development Corporation* (73-8303) and the judgment entered therein. It was an independent action instituted by M.A.R. on November 23, 1973 — approximately two years after the instant case was filed — where it claimed and obtained a judicial decision against Banco Credito directing the latter to return to it a $458,000.00 certificate of deposit to the bearer it had given in pledge, and this, in turn, was in substitution of the $450,000.00 *mortgage to the bearer* it had delivered to the bank

when it became a joint surety of the obligation undertaken by A & P General Contractors and the bank in the July 23, 1971 transaction. It appears from that judgment that for the adjudication of the action filed by M.A.R., the court saw the need to decide, and in fact decided, the main issue of the present suit between A & P General Contractors and the FDIC, the bank's successor. It recognized the existence, and the bank's breach, of an obligation to give A & P General Contractors the already mentioned third line of credit.

It is in accordance with said prior decision, and under the offensive assertion of the doctrine of *collateral estoppel by judgment*, that the court below subsequently held, in the case at bar, that the bank and its successor, FDIC, were precluded from relitigating the same issue. Consequently, it rendered the partial judgment under review, declaring that the bank breached the obligation entered into on July 23, 1971, to grant A & P General Contractors a third line of credit. It deferred consideration of the damages.

The trial court interpreted *Pol Sella* v. *Lugo Christian*, 107 D.P.R. 540 (1978), as holding that the requirement of identity or mutuality of the res judicata doctrine, and consequently of the collateral estoppel doctrine, is not in effect in Puerto Rico. In spite of this, it found that there were certain common bonds between A & P General Contractors and M.A.R. Development Corp. by virtue of the contract whereby the latter became the joint surety of one or some of the former's obligations, thus getting round the requirement of identity or mutuality, and in turn allowing A & P General Contractors to use the adverse judgment in the M.A.R. suit against the bank. Finally, it incorporated into our juridical system the offensive use of the doctrine of collateral estoppel by judgment established in the federal jurisdiction in the leading case of *Parklane Hosiery Company, Inc.* v. *Shore*, 439 U.S. 322 (1979).[1]

[1] In it, a stockholder filed a class action against the corporation and some of its officials, directors, and stockholders, alleging that they had issued a misleading proxy statement. Later on, the Securities and Exchange Commission (SEC) filed an *independent* action on the same allegation, seeking an

Appellant FDIC argues the inapplicability of the offensive assertion of the collateral estoppel doctrine in view of the fact that not all of the requirements set forth in *Parklane*, *supra*, and in sec. 88 of *Restatement (Second) Judgments* were complied with. It also analyzes its negative effect on outstanding loans and adduces several decisions establishing that, in Puerto Rico, collateral estoppel may not be asserted to commit an injustice.

II

[1-2] We must evaluate and compare the faithful and just solution of this case under the light of two possible alternatives. Let us see. Presuming as correct the lower court's premise that in *Pol Sella* v. *Lugo Christian*, *supra*, we banished from our jurisdiction the requirement of *identity* of the res judicata and, consequently, from the collateral estoppel doctrine, the said doctrine could still be asserted in two ways or modalities: defensively or offensively.[2] In each case, the procedural dynamics is inferred from its name, that is, it is asserted *defensively* by a defendant to bar the litigation of an issue that has already been raised and lost by the plaintiff in a prior suit against another party. And it is asserted *offensively* when a plaintiff bars the defendant from relitigating issues previously litigated and lost against another party. Note that in both situations, the defensive and the offensive, the party which is estopped: (i) has litigated; (ii) has been the losing party in the prior suit.

Although its definitions are simple, even in those jurisdictions that have definitely abandoned the rule of identity or mutuality, the doctrine of collateral estoppel by judgment had not been uniformly applied in its different modalities. While

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injunction. The SEC action *first* ended with a declaratory judgment finding the statement misleading. The plaintiff in the first action then asserted that defendants were estopped from relitigating said matter. After an analysis, the U.S. Supreme Court allowed the offensive use of collateral estoppel by judgment, and held that the policy to be followed in federal courts was to recognize to them discretion to determine when to allow the offensive use of said doctrine, after compliance with some requirements.

[2] *Blonder-Tanque Laboratories* v. *University of Illinois Foundations*, 402 U.S. 313 (1971) and *Parklane Hosiery Company, Inc.* v. *Shore*, 439 U.S. 322 (1979).

the defensive use of the doctrine — there being no identity of parties — has been generally accepted, its offensive use has been the object of serious debates.[3]

With a view to clearing up these disputes, the U.S. Supreme Court, after discussing the weightier criticism raised against the offensive assertion of the aforesaid doctrine,[4] opted to validate it in *Parklane, supra*. It held:

> We have concluded that the preferable approach for dealing with these problems in the federal courts is not to preclude the use of offensive collateral estoppel, but to

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[3] Against offensive use, absent the requirement of identity of parties: Note, *Impacts of Offensive Assertion of Collateral Estoppel by a Nonparty*, 35 Geo. Wash. L. Rev. 1010, 1032-36 (1967); Comment, *Nonparties and Preclusion by Judgment: The Privity Rule Reconsidered*, 56 Calif. L. Rev. 1098 (1968); *Spettigue* v. *Mahovey*, 445 P.2d 557 (Ariz. App. 1968); *Reardon* v. *Allen*, 213 A.2d 26 (N.J. Super. 1965); *Albernaz* v. *Fall River*, 191 N.E.2d 771 (Mass. 1963); *Nevarov* v. *Caldwell*, 327 P.2d 111 (Calif. App. 1958). Besides, Anno., *Mutuality of Estoppel as Prerequisite of Availability of Doctrine of Collateral Estoppel to Stranger to the Judgment*, 31 A.L.R.3d 1044, 1076-77 (1970).

For offensive use: Vestal, *Res Judicata Preclusion: Expansion*, 47 So. Calif. L. Rev. 357 (1974); A. Vestal, *Res Judicata Preclusion*, 317-22 (New York 1969) Matthew Bender; Currie, *Civil Procedure: The Tempest Brews*, 53 Calif. L. Rev. 25 (1965); *Znadok* v. *Glidden Co.*, 327 F.2d 944 (2d Cir. 1963), *cert. denied*, 377 U.S. 934 (1964); *B.R. DeWitt, Inc.* v. *Hall*, 225 N.E.2d 195 (N.Y. 1967); *Waitkus* v. *Pomeroy*, 506 P.2d 292 (Colo. Ct. App. 1972); *United States* v. *United States Air Lines, Inc.*, 216 F.Supp. 709 (E.D. Wash. and D. Nev. 1962), *United Air Lines, Inc.* v. *Wiener*, 335 F.2d 379 (9th Cir.), *cert. denied*, 379 U.S. 951 (1964); *Desmond* v. *Kramer*, 232 A.2d 470 (N.J. Super. 1967); *McCourt* v. *Algiers*, 91 N.W.2d 194 (Wis. 1956); *Garcy Corp.* v. *Home Ins. Co.*, 496 F.2d 479 (7th Cir. 1974); *King* v. *Grindstaff*, 200 S.E.2d 799 (N.C. 1973); *Hossler* v. *Barry*, 48 L.W. 2063 (Me. 1979).

[4] The following criticism is discussed: (1) that the offensive use of collateral estoppel does not promote judicial economy in the same manner as the defensive use, for it propitiates that interested parties not join the action while waiting for a decision to receive its benefit or to remain immune if the result is adverse to its interests; (2) the possibility that the defendant in a first suit will not have enough incentives to carry on an active litigation; and (3) that it is unfair to allow the offensive use when in the second action the defendant would have procedural opportunities not available to him in the first one.

> grant trial courts broad discretion to determine when it should be applied. The general rule should be that in cases where a plaintiff could easily have joined in the earlier action or where, either for the reasons discussed above or for other reasons, the application of offensive estoppel would be unfair to a defendant, a trial judge should not allow the use of offensive collateral estoppel.

As additional judicial guidelines, it established the basic rule that its application would be unfair if any of the following circumstances were present: (a) if the plaintiff could have easily been a party to the original suit; (b) if the defendant did not have all the necessary incentives to litigate fully and vigorously the controversies present in the first suit; (c) if the judicial decision in the first suit was inconsistent with other decisions on the same question; and (d) if in the second suit the defendant had procedural opportunities not available in the first action, which could lead to a different result.[5]

[3] Bearing these guidelines in mind, we must agree with the trial court that, in the instant case, A & P General Contractors, Inc., the plaintiff asserting estoppel, had at its disposal all the procedural means allowed by our rules to intervene in the original case, but did not do so. Since it knew of the efforts made by the defendant bank to consolidate both actions, its attitude was passive and rather in opposition, for in the prior suit M.A.R. Development Corporation objected to it even though its legal representative was the same.[6]

[4] It is difficult to reconcile that even though the collateral estoppel doctrine has its raison d'etre on economic and procedural considerations — such as protecting litigants

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[5] There is no consensus among the authorities as to the exceptions or circumstances where the offensive use of collateral estoppel by judgment should not be allowed. See, *Restatement (Second) Judgments* § 68.1, App. 88 (Tent. Draft No. 3, 1976).

[6] The record shows that on several occasions the bank tried to consolidate the actions. M.A.R., represented by its attorneys, always opposed the consolidation.

against the harassment of being subjected to repeated litigations on the same controversy, promoting judicial economy by avoiding unnecessary suits, and preventing inconsistent judgments — the doctrine could be used because the so-called procedural economy was sidetracked when both actions were not consolidated, thus facilitating the existence of this suit. The reasonable thing would have been for both to be decided jointly.

The reasons adduced by appellee explaining why the cases were not consolidated do not persuade us, much less when the same lawyers were in charge of the legal representation in both suits.

Under this first alternative, the doctrine of collateral estoppel by judgment would not be applicable; thus, the court below erred.

III

Now then, there is another reason why the judgment under review cannot be upheld. Both the trial judge and the appellee sustain that in *Pol Sella* v. *Lugo Christian*, *supra*, we *abandoned* the rule of mutuality or identity in collateral estoppel and res judicata. Let us examine this approach.

Article 1204 of the Civil Code exalts the rule of mutuality or identity.

> In order that the presumption of the res adjudicata may be valid in another suit, it is necessary that, between the case decided by the sentence and that in which the same is invoked, there be *the most perfect identity between the things, causes, and persons of the litigants, and their capacity as such*. (Emphasis supplied.)

Although it is true that in *Pol Sella* we mentioned the development of the concept of identity of parties beyond the rule of mutuality — after discussing the existence of the different identities — we held, with regard to persons:

> We could also conclude that there is identity of the persons or parties to the action, and of their capacity as such, is we consider that the minor Arnaldo Pol Lugo is the party really interested both in the declaration of civil status provided in art. 263 of the Penal Code, and in the new action to challenge the paternity. In the case for abandonment of children, and specifically in the procedure to establish the paternity, the Government does not take the place of the minor as a party, but acts in his behalf. . . . (At 549, footnote omitted.)

This holding defeats the interpretation of the court below, and any speculation to that effect.

[5] Note that in Puerto Rico we have the unique situation that there are two legal systems in effect, one in the substantive area, and another of a procedural nature, resulting from the influence of Anglosaxon Law originating in the United States. With a view to creating an autochthonous Law our position has always been to take the best elements of both systems — without barring the possibility of resorting to other areas — harmonize them and make them a part of our legal system. This explains the adoption of the legal concept "collateral estoppel by judgment", which is effective when a fact essential for rendering a judgment is elucidated and determined in a final and valid judgment. As a result, said determination is conclusive in a second action between *the same parties*, even when there are different causes of action. *Vidal* v. *Monagas*, 66 P.R.R. 588 (1946); *Long Corporation* v. *District Court*, 72 P.R.R. 737 (1951); *Fuentes* v. *District Court*, 73 P.R.R. 893 (1952); *Pereira* v. *Hernandez*, 83 P.R.R. 156 (1961).

In accordance with strict, scientific legal theory, we are forced to admit that the development of this doctrine has not taken a definite trajectory in our jurisdiction, for on some occasions it has been treated as an independent institution and on others it has been considered a modality of the doctrine of

res judicata. *Capo Sanchez* v. *Sec. of the Treas.*, 90 P.R.R. 145, 150 (1964); *Daubon* v. *Srio. de Hacienda*, 106 D.P.R. 400, 407 (1977). In spite of this, it should be accepted that this concept has always been considered a variant of res judicata where identity of causes is not necessary. The general principles of the doctrine were set down in *Bolker* v. *Super. Ct.; Sosa, Int.*, 82 P.R.R. 785 (1961):

> In order that the plea of res judicata may be valid, the concurrence of four identities is necessary; two objective — thing and cause; *Aqueduct and Sewer Authority* v. *Reyes*, 77 P.R.R. 10, 14-16 (1954); *Silva* v. *John Doe*, 75 P.R.R. 198, 202 (1953); *Vidal* v. *Monagas*, 66 P.R.R. 588 (1946); *Insular Board of Elections* v. *District Court*, 63 P.R.R. 786 (1944); Judgment No. 6 of the Supreme Court of Spain of March 20, 1956, III-55 *(Jur. Civ.* 726); and two subjective — persons and their representatives. *Camacho* v. *Catholic Church*, 72 P.R.R. 332 (1951); *Ex parte Soto*, 71 P.R.R. 511 (1950); *Municipality* v. *Rios*, 61 P.R.R. 98, 101 (1942); *De Leon* v. *Colon*, 42 P.R.R. 21 (1931). (At 792.)

Thus, we note that our case law had not vacillated in resorting to different sources to construe the res judicata doctrine, resorting both to Spanish texts and to common law sources, even though they differ on several points.[7] These differences have allowed for a development of both concepts — res judicata and collateral estoppel by judgment — that is different from ours.[8]

However, in *Lausell Marxuach* v. *Diaz de Yanez*, 103 D.P.R. 533 (1975), we subsequently clarified the doctrinal direction we would follow:

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[7] See: Comment, *Litigation Preclusion in Louisiana: Welch* v. *Crown Zellerbach Corp. and the Death of Collateral Estoppel*, 53 Tul. L. Rev. 875 (1979).

[8] In Louisiana, the collateral estoppel doctrine was useful for many years, but it was recently abandoned by the Supreme Court: *Welch* v. *Crown Zellerbach Corp.*, 359 So.2d 154 (1978).

> The doctrine of res judicata, *res judicata pro veritate habetur*, is of ancient Roman origin: De Leon y Olarieta, *Observaciones filosofico-juridicas acerca de la autoridad de cosa juzgada*, 44 Rev. Gen de Leg. y Juris. 5, 15-22 (1874). *It is part of our Civil Law and except for comparative purposes, we need not resort to other sources for its analysis. For its application art. 1204 of our Code, 31 L.P.R.A. § 3343, requires "that, between the case decided by the sentence and that in which the same is invoked, there be the most perfect identity between the things, causes, and persons of the litigants, and their capacity as such."* (At 535, emphasis supplied.)

The importance of the foregoing should not be underestimated, for it places us in the correct perspective in the study of the legal concept under consideration.

IV

[6] Having in mind the applicable general principles of our case law, let us examine the facts in the actions in question to determine if there actually is perfect identity between the things, the causes, the litigants, and their capacity as such. The first thing that is clear is that the first requirement of identity, that is, identity of things, "the object or matter over which the action is exercised", is certainly present. *Lausell Marxuach* v. *Diaz de Yanez*, *supra* at 535. The thing or the object is the contract between the bank, A & P General Contractors, Inc., and M.A.R. which is the *same one* in both actions. Any doubt as to this point vanishes when Lacoste's rule to determine identity of object is applied: [There is identity] "if when deciding on the object of a complaint, the judge may contradict a prior decision affirming a right arisen or arising from, or a right affirmed by this prior decision. If any decision entails this contradiction, there is identity of object. . . ." E. Jimenez Asenjo, *Sobre el alcance real de la cosa juzgada*, 184 Rev. Gen de Leg. y Juris. 63, 73, n.1 (1948).

[7] Hence, the requirement of identity of *causes* is undoubtedly present. In this analysis there is no need to talk about collateral estoppel by judgment. Remember that cause is "the motive for asking", 20 Scaevola, *Codigo Civil* 535 (2d ed. 1958). It does not refer to "the reason or motive of a contract", but it rather "means the main ground, the origin of the actions or exceptions raised and resolved." 8-2 Manresa, *Comentarios al Codigo Civil Espanol* 237-238 (5th ed. 1950). Thus, the Supreme Court of Spain has held that "the diversity of actions does not preclude the acceptance of the res judicata when the reason and cause for asking is the same in one and the other, and therefore it is not the name or the declarative or constitutive nature that may bar the identity of the thing sought, but rather the decision is if the facts and grounds of the petitions are the same as regards the question raised." (Judgment of February 19, 1962, Manresa, *op. cit.)* Another judgment sets forth that "the cause is equivalent to a ground or reason for asking, the action being a mere procedural modality that need be exercised for the former to be effective at a trial; that if the things and causes are identical, the efficacy of the res judicata is not hindered by the fact that the action is given a different name, without the basic identity of the presumption disappearing because a different request was made in the second trial, which has not been decided in the first. . . ." (Judgment of October 30, 1965.)

As to the *identity of persons*, we have to conclude that M.A.R. Development Corporation and A & P General Contractors, Inc. are not the same person. This solution prevails even if we take into account that art. 1204 of the Civil Code provides that "[i]t is understood that there is identity of persons whenever the litigants of the second suit are legal representatives of those who litigated in the preceding suit, or *when they are jointly bound with them*. . . ." (Emphasis supplied.) 31 L.P.R.A. § 3343.

[8] The Common bonds required for there to be identity of persons are those in which "the person who litigates in the

second action exercises the same action and invokes the same grounds and relies on the same titles as in the first". *Heirs of Zayas Berrios* v. *Berrios*, 90 P.R.R. 537, 551-52 (1964); *Gonzalez* v. *Mendez et al.*, 15 P.R.R. 682, 698 (1909). The bond sought is that capable of placing the parties in such a position, as if they were only one in relation to the prestations that may be in issue, and it is the same type of relationship that exists between the successor in interest and the predecessor. We conclude that the fact that the parties in both suits are joint debtors is not sufficient to achieve the above. Though it is true that both M.A.R. Development Corporation and A & P General Contractors, Inc. were jointly liable to the bank, that same relationship in turn produced different effects for the parties: M.A.R.'s relation was rather a contract with A & P General Contractors, Inc., for the benefit of a third party, in this case the bank. In practice, we can see how, while the bank's alleged act or omission only produces an action for the revendication of a pledge in M.A.R.'s case, in A & P's case it produces a tort action arising out of a contractual relationship.

Not only is there a lack of identity between the parties, but also a lack of identity of their *capacity* as such. In the first action, plaintiff M.A.R. entered in its capacity as surety, a pledgor subject to a collateral obligation that terminates once the principal obligation is extinguished, but not inversely. In the second action, plaintiff A & P General Contractors, Inc. is the principal debtor. Gomez Orbaneja's words illustrate this point: "According to Hellwig, identity is also lacking if the pledgee or the usufructuary litigates in the first suit, and the owner in the second. It shall also be lacking if a creditor or a trustee, or an agent, litigates first and the original owner or the principal comes in in the second. . . ." 1 E. Gomez Orbaneja, *Derecho Procesal Civil* 406 (1st ed., Madrid 1975).

In short, since some of the requirements of the identity rule are missing, we are forced to conclude that the doctrine of res judicata is inapplicable to the instant case. The doctrine of collateral estoppel by judgment, as it has been adopted in our legal system, cannot be invoked either.

Judgment shall be rendered reversing the partial judgment of April 11, 1980, and the case shall be remanded for further proceedings not inconsistent with this opinion.

Mr. Justice Irizarry Yunque concurs in the result without an opinion. Mr. Chief Justice Trias Monge disqualified himself and Mr. Justice Díaz Cruz took no part in this decision.

APPENDIX I

IN THE SUPREME COURT OF PUERTO RICO

No. R-74-54

MIGUEL D. LAUSELL MARXUACH,
PLAINTIFF-APPELLANT,

v.

PRISCILLA DIAZ DE YANEZ,
DEFENDANT-APPELLEE.

ORDER OF JANUARY 25, 1974, ISSUED BY JUDGE CARMEN CONSUELO CEREZO, Bayamon Part (Civil Matters)
REVIEW

MR. CHIEF JUSTICE TRIAS MONGE
delivered the opinion of the Court.

San Juan, Puerto Rico, March 11, 1975

Plaintiff-appellant, an attorney, married defendant-appellee on June 5, 1965. They had two daughters. An action for the divorce of the parties was filed in 1971. A very long stipulation subscribed by the parties and their respective attorneys was filed in said case. Said stipulation established that the marital community owned a dwelling, that appellee would administer the same, that the rents would be equally divided among both parties, and that, at the final liquidation of the marital community, each would acquire fifty percent of the dwelling. The case was heard on August 25, 1971, the same day that the stipulation was filed in the Superior Court. The Court found for appellee in the complaint grounded on cruel treatment, fixing a monthly alimony of six hundred and fifty dollars. The stipulation on the division of the community property was ap-

proved, and its liquidation ordered. No appeal was taken from this judgment.

About five months later, on January 19, 1972, in a case for reduction of alimony brought by appellant, the latter ratified that the house in question belonged to the marital community. The alimony was reduced to three hundred dollars per month.

Nearly four months later, in May 1972, appellant filed an action for declaratory judgment where he challenged the stipulation filed in the previous litigation and requested that the residence mentioned therein be declared his separate property. Appellant grounded his petition on that "the aforementioned stipulation arose during a period of emotional crisis suffered by plaintiff and it was done for the purpose of speeding up the divorce proceeding." Appellee filed a motion invoking the doctrines of res judicata and collateral estoppel by judgment, and the trial court dismissed the complaint. Appeal is taken from this judgment.

We do not agree with appellant. In this case there is basis to argue the appropriateness of the defense of res judicata; but even if the latter could not be invoked, appellant's claim faces unsurmountable obstacles.

[1] The doctrine of res judicata, *res judicata pro veritate habetur*, is of ancient Roman origin: De Leon y Olarieta, "*Observaciones filosofico-juridicas acerca de la autoridad de cosa juzgada*," 44 *Rev. Gen. de Leg. y Juris.* 5, 15-22 (1874). It is part of our Civil Law and, except for comparative purposes, we need not resort to other sources for its analysis. For its application art. 1204 of our Code, 31 L.P.R.A. § 3343, requires "that, between the case decided by the sentence and that in which the same is invoked, there be the most perfect identity between the things, causes, and persons of the litigants, and their capacity as such."

The last two requirements are evident. With regard to the thing and the cause, it is advisable to reiterate the governing principles.

The thing corresponds basically to the object or matter over which the action is exercised. It has been said that an accurate criterion to determine the identity of the object is the following: if a judge ventures to contradict a prior decision asserting a natural or incipient right, there is identity of the object and res judicata. Jimenez Asenjo, E., *"Sobre el Alcance Real de la Cosa Juzgada,"* 184 *Rev. Gen. de Leg. y Juris.* 63, 73, note 1 (1948). The peculiarity of the instant litigation lies only on the fact that the adjudication covers two things: the divorce decree in itself and the declaration, as basis for the upcoming division of the marital community that the dwelling in dispute belongs to said community. The fact that the second action does not challenge the divorce does not bar the exception of res judicata with regard to the intent of invalidating the determination with regard to the ownership of the dwelling. Manresa has said that "A decision made on a totality of things, generally involves that of the different parts . . ." VIII-2 Manresa, *Comentarios al Codigo Civil Espanol* 297, 6th ed. 1967. Appellant's own confession in his action for declaratory judgment, and what is more, his movingly simple explanation to the effect that he signed the stipulation "for the purpose of speeding up the divorce proceeding," show that the two things adjudged are so intertwined that, within the instant circumstances, they actually constitute a single object.

[2] Insofar as the cause is concerned, the term means "the principal ground, the origin of the actions or exceptions raised and decided, and it must not be mistaken for the means of proof nor for the legal grounds of the claims adduced by the parties." Manresa, *op. cit.*, 301. There is no diversity of causes in the case under our consideration. There is no real distinction of claims between the second and the first cause, excepting their number. It is as if an appellant did not request the destruction of the entire building represented by a first adjudication and limits himself modestly to request the demolition of its foundations or of a significant part thereof.

As we have set forth before, the rule of res judicata is "attended by public interest and directed to maintain private

peace, *Cintron* v. *Yabucoa Sugar Co.*, 54 P.R.R. 493 (1939), and to avoid the perpetuation of judicial controversies, and it is grounded on the convenience of recognizing the dignity to which the judgments of courts are entitled. . . . [T]he defense of res judicata may be set up even if the grounds of the judgment are erroneous, provided it was rendered within its competency and in the absence of fraud." *Bolker* v. *Super. Ct.; Sosa, Int.*, 82 P.R.R. 785, 800-801 (1961).

In *Perez* v. *Bauza*, 83 P.R.R. 213, 219 (1961) and in other cases, we have noted that if the strict application of the doctrine of res judicata "would in practice defeat a right permeated in some way with public interest, the courts are inclined to a solution which would guarantee proper justice instead of rigidly applying a fiction of law which rests fundamentally upon a principle of convenience and procedural order . . ." We are not dealing here, however, with a situation comparable to that which gave rise to the rule of *Perez*. On the contrary, to extend *Perez* to circumstances as those framing the present dispute would be highly injurious to the interests of the good administration of justice, undermining the finality of the judgments in divorce actions where the bases for the partial or total division of the marital community are established.

[3] Finally, the fact that the question in controversy was the object of a stipulation and not of a contentious litigation as such, does not help appellant. We have repeatedly held that the doctrine of res judicata is undiscriminately applied in both situations. *Ex parte Morales*, 17 P.R.R. 1004 (1911); *Cintron* v. *Municipal Court*, 67 P.R.R. 743, 747-48 (1947).

[4, 5] Even assuming that the defense of res judicata was not applicable in this case, other doctrines weigh against appellant's position. In the first place we have the old civil law doctrine of one's own acts. Aguilar y Garcia, A.: "*Los Actos Propios en la Jurisprudencia del Tribunal Supremo*," 1 *Rev. de Derecho Privado* 18 (1913). The doctrine is summarized in the phrase "Nobody can go against his own acts" and has obvious tangencies with the Anglo-Saxon theory of "estoppel" even

though there are differences in their development and contents. The doctrine of one's own acts has been long recognized by our case law. *Mendez* v. *Administration of P.R.*, 6 P.R.R. 173 (1904); *Emmanuel* v. *The People*, 7 P.R.R. 216 (1904); *Davila* v. *Sotomayor*, 36 P.R.R. 701, 704 (1927). For recent Spanish case law on this doctrine see: Judgment of April 3, 1973 (Aranzadi No. 3795) and Judgment of July 5, 1973 (Aranzadi No. 2947). Since appellant has not established the nonexistence of cause, the existence of fraud or deceit or any reason of public policy to challenge what was done, he is precluded from going against his own acts, whether or not there was a judgment regarding the same matter in another suit.

With regard to this theme it is important to point out that art. 101, second and third ordinals, of our Law of Evidence, Act of March 9, 1905, as amended, 32 L.P.R.A. § 1886 (2) and (3), provides an independent basis for the doctrine of a person's own acts and for the use of the direct "estoppel." As a matter of fact, in *Rabell* v. *Rodriguez et al.*, 24 P.R.R. 526 (1916), both doctrines are placed on the same footing, though what has happened throughout the years is that the essential principles which make up the English "estoppel" have been extended to different countries and to international law itself, as it happened here when the Law of Evidence was approved. MacGibbon, "*Estoppel in International Law*," 7 Int. and Comp. L. Q. 468 (1958). In Spain itself some commentators already mention the proper application of the theory in certain situations. 1-2 Puig Brutau, *Fundamentos de Derecho Civil* 86-87 (1959); *ibid.* Tome 2, Vol. 2, pp. 648-649.

In view of the foregoing conclusions it is not necessary, however, to pronounce ourselves on the applicability or nonapplicability in this case of the theory of "estoppel", or on the doctrine of collateral estoppel by judgment. See: *Fuentes* v. *District Court*, 73 P.R.R. 393, 912-13 (1952); *Rodriguez* v. *Albizu*, 76 P.R.R. 590 (1954).

In view of the foregoing, the order appealed from is affirmed.

Mr. Justice Marco A. Rigau and Mr. Justice Carlos V. Davila took no part in this decision. Mr. Justice Angel M. Martin concurs in the result without an opinion.

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In the
Supreme Court of the United States

OCTOBER TERM, 1990

No. 90-1470
No. 90-1513

COLEGIO DE ABOGADOS DE PUERTO RICO,
and
CARMEN ANA CULPEPER, ET AL.,

PETITIONERS,

v.

ROBERT E. SCHNEIDER; HECTOR RAMOS; ORESTE V. RAMOS; JORGE F. ROMANY, AND JORGE SOUSS

RESPONDENTS.

ON PETITIONS FOR WRITS OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

RESPONDENTS JOINT AND CONSOLIDATED RESPONSE TO PETITIONS FOR WRITS OF CERTIORARI

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ON PETITIONS FOR WRITS OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

RESPONDENTS JOINT AND CONSOLIDATED RESPONSE TO PETITIONS FOR WRITS OF CERTIORARI

SUMMARY OF ARGUMENT

Petitioners ask this Court to review, on jurisdictional and procedural grounds, the decision of the Court of Appeals for the First Circuit, affirming in part the decision of the District Court. They do not question the decision on the merits. All of the issues they raise have raised and argued and resolved more than once in the District Court and in the Court of Appeals and no substantial reasons are alleged for further review of these same issues by this Court.

The issues of want of jurisdiction, *res judicata* and lack of case or controversy were first raised in 1982 and have since then been raised and argued and resolved again and again. This time the petitioners seek to buttress their position by misstating the facts in a vain effort to circumvent the principal barriers to their claims for dismissal on these grounds. This Court should deny any petition based on these grounds and should call to account any party resorting to such tactics.

The other arguments raised by petitioners as grounds for the issuance of the writs lack substance or sufficient importance to merit review by this Court.

PARTIES

The parties in the proceedings now pending before this Court are the Colegio de Abogados de Puerto Rico (the "Colegio"), petitioner in case number 90-1470 and cross-respondent in case number 90-1651; the Secretaries of Justice and of the Treasury of the Commonwealth of Puerto Rico (the "Secretaries"), petitioners in case number 90-1513 and cross-respondents in case number 90-1651; and the Justices (the "Justices") of the Supreme Court of the Commonwealth of Puerto Rico (the "State Court") on the one side and, on the other side, Hector R. Ramos and Robert E. Schneider, Jr. ("Ramos & Schneider"), Oreste V. Ramos ("Oreste"), Jorge F. Romany ("Romany") and Jorge Souss ("Souss"), respondents (the "Respondents") in cases number 90-1470 and 90-1513 and cross-petitioners in case number 90-1651.

STATEMENT OF THE CASE

This controversy commenced on June 9, 1982 with the filing of a civil rights action for declaratory and injunctive relief and damages by Ramos & Schneider in the U.S. District Court for the District of Puerto Rico, the "District Court"), against the Colegio, the Secretaries and the Justices, challenging, among others, on federal constitutional grounds, the compulsory bar membership and funding system imposed by the laws of Puerto Rico and the use of public facilities to sell Colegio stamps without charge to the Colegio. Later in the same month similar actions were filed in the District Court by Oreste, Romany and Souss against the same defendants and all of these action were later consolidated, the "Consolidated Actions").

This controversy has been the subject of three opinions by the U.S. Court of Appeals for the First Circuit (the "Court of Appeals"), and five (not four as stated by the Secretaries at page 3 of their petition) opinions and orders by the District Court. In chronological order the decisions of the Court of Appeals and of the District Court are as follows:

District Court Opinion of September 13, 1982 (the "1982 Jurisdiction Decision") reported at 546 F. Supp. 1251 (1982) denying the motions to dismiss the Consolidated Actions for want of

jurisdiction under the holding in *Rooker v Fidelity Trust Co.*, 263 U.S. 413 (1923) ("*Rooker*"); on *res judicata* grounds; under Article III of the U. S. Constitution, for failing to present an adjudicative controversy, and, as to Colegio stamps, as barred by the *Tax Injunction Act*, 28 U.S.C. Section 1341, and the *Butler Act*, 48 U.S.C. Section 872, filed by the Justices and the Colegio, and the motion to dismiss the claims as to Colegio stamps as barred by the *Tax Injunction Act* and the *Butler Act*, filed by the Secretaries.

Court of Appeals Opinion of December 8, 1982 (the "*1982 Court of Appeals Decision*"), reported at 695 F.2d 17, denying the petitions of the Justices and of the Colegio for writs of mandamus for the dismissal of the Consolidated Actions for want of jurisdiction under *Rooker*; on *res judicata* grounds; under Article III of the U.S. Constitution for failing to present an adjudicative controversy and, with respect to Colegio stamps, as barred by the *Tax Injunction Act* and the *Butler Act* and granting in part the Justices petition for a writ of mandamus for dismissal for failing to state a claim against them except as to Colegio stamps issue as to which the Justices were to continue as nominal parties. The Secretaries did not file any petition for writ of mandamus, were not parties to, and did not participate in *1982 Court of Appeals Decision.*

District Court Opinion and Judgment of June 16, 1983 (the "*1983 District Court Judgment*"), reported at 565 F. Supp. 963 in the Consolidated Actions holding that the laws of Puerto Rico that imposed the compulsory bar membership and funding system and required that public facilities be used to sell Colegio stamps without charge to the Colegio, as interpreted, enforced and applied, violated speech and associational rights guaranteed by the First Amendment to the U.S. Constitution and were contrary to either the Fifth or the Fourteenth Amendments, and granting declaratory and injunctive relief against the Colegio and the Secretaries and damages against the Colegio.

District Court Opinion, Order and Amended Judgment of June 30, 1983 (the "*1983 District Court Order*"), reported at 572 F. Supp. 957 denying the Colegio's motion for stay of the *1983 District Court Judgment* and ordering the amendment of the *1983 District Court Judgment* to show that there was no bar to the voluntary payment of

Colegio membership dues or to the voluntary purchase of Colegio stamps by lawyers.

Court of Appeals Opinion of August 23, 1984 (the "*1984 Court of Appeals Decision*"), reported at 742 F.2d 32, on the appeal filed by the Colegio to the *1983 District Court Judgment*, as amended by the *1983 District Court Order*, holding that the District Court should have abstained from acting while still retaining jurisdiction because the State Court had not yet completed its remedial action having issued a resolution after the *1983 District Court Judgment* stating that the remedy adopted by the Colegio was still before its consideration pending approval, modification or rejection, and vacating the *1983 District Court Judgment* and remanding the case for proceedings not inconsistent with the *1984 Court of Appeals Decision*.

District Court Opinion and Order of August 21, 1987 (the "*1987 Jurisdiction Decision*"), reported at 670 F. Supp. 1098, denying the Colegio's motion to dismiss the Consolidated Actions for want of jurisdiction under *Rooker*; on *res judicata* grounds, and for failing to present a case or controversy.

District Court Opinion and Judgment of March 3, 1988 (the "*1988 District Court Judgment*"), reported at 682 F. Supp. 674, in the Consolidated Actions, holding that the laws of Puerto Rico that imposed the compulsory bar membership and funding system, as interpreted, enforced and applied, violated speech and associational rights guaranteed by the First Amendment to the U.S. Constitution and were contrary to either the Fifth or the Fourteenth Amendments; granting declaratory and injunctive relief against the Colegio and the Secretaries and damages against the Colegio, and denying Respondents challenge to the use of public facilities to sell Colegio stamps without charge for lack of taxpayer standing.

Court of Appeals Opinion of October 24, 1990 (the "*1990 Court of Appeals Decision*"), reported at 917 F.2d. 620, on the appeals filed by the Colegio and the Secretaries from the *1988 District Court Judgment*, affirming that judgment as to damages awarded against the Colegio and the injunctive relief granted but delaying implementation of injunctive relief for six months to give the Colegio an opportunity to modify the system to protect dissenters rights so as to resolve the constitutional problems identified in the opinion,

reversing the *1988 District Court Judgment* as to the use of the proceeds from the sale of Colegio stamps.

In November of 1977, prior to the filing of the Consolidated Action, the Colegio filed an action for disbarment (the "1977 Disbarment Action"), in the State Court against 99 lawyers, including Ramos & Schneider and Romany, for failing to pay their arrears in Colegio compulsory dues. Romany paid his arrears in compulsory dues in 1978 and thereafter was eliminated as a party in the 1977 Disbarment Action. Respondents Souss and Oreste were never included as parties in the 1977 Disbarment Action. Contrary to the assertions of the Colegio, at pages 2 and 10 of their petition, and of the Secretaries, at page 4 of their petition, the 1977 Disbarment Action never did include all five of the Respondents herein.

Ramos & Schneider, the only Respondents who were parties in the 1977 Disbarment Action, challenged, under the laws and Constitution of Puerto Rico, those laws of Puerto Rico that compelled all lawyers, including acting judges in the local courts and in the Federal courts, as condition to the right to practice law in Puerto Rico, to be members of and fund the Colegio by the compulsory payment of dues and purchase of Colegio stamps and the use by the Colegio of the funds they were compelled to contribute to it for ideological and political ends. On April 5, 1982, more than five years later, after many incidents involving contradictory State Court orders and frustrated attempts at discovery, the State Court finally issued its Opinion and Judgment (the "*1982 State Court Decision*"), reported at 112 D.P.R. 540, upholding the validity and constitutionality, under the laws and constitution of Puerto Rico, of the Colegio compulsory membership and funding system; holding that the Colegio had the right and obligation to engage in political and ideological activity "for the social advancement of the community," because, according to the majority opinion of Chief Justice Trias Monge, of its very special mission in converting Puerto Rico's traditionally monolithic milieu to a pluralistic society, recognizing, however, a limited but not retroactive right of lawyers to object to the use for ideological ends unrelated to the Colegio statutory purposes, of the compulsory dues paid by lawyers to the Colegio; directing the Colegio to adopt a method, following the guidelines set forth in the *1982 State Court Decision* and "heeding the principles laid down in *Street, Allen and*

Abood," although these made "no definitive pronouncement on this prickly problem," for such objecting lawyers to seek partial refunds of future payments of compulsory dues of the portion used by the Colegio for ideological ends they objected to, and ordering all parties in the 1977 Disbarment Action, including Ramos & Schneider, but none of the other three Respondents in these cases, to pay their arrears in Colegio compulsory dues or be disbarred. Associate Justice Negron Garcia, who, on June 16, 1982, disqualified himself from any future participation in the case because he was the brother of attorney Arturo Negron Garcia, one of the lawyers who represented the Colegio in the 1977 Disbarment Action and a past and future president of the Colegio and member of its Council of Presidents, wrote a concurring opinion on April 5, 1982 in the 1977 Disbarment Action, holding that the elimination of the compulsory Colegio for its past or present errors was not justified in a "pluralistic society" such as existed in Puerto Rico.

The Colegio in May of 1982 filed a motion in the State Court naming 17 lawyers who were parties to the 1977 Disbarment Action, including Ramos & Schneider but none of the other three Respondents herein, who were still in arrears in the payment of Colegio compulsory dues and asking the State Court to proceed against these 17 in accordance with the *1982 State Court Decision*. By Order of June 3, 1982, the State Court, noting that the *1982 State Court Decision* was final and firm, disbarred Ramos & Schneider for non-payment of their arrears in Colegio compulsory dues but took no action whatsoever against the other 15 lawyers named by Colegio in its May, 1982 motion as parties in the 1977 Disbarment Action and subject to sanction under the *1982 State Court Decision* for non-payment of their Colegio compulsory dues.

In 1985, after the *1984 Court of Appeals Decision* vacating the *1983 District Court Judgment* and ordering the District Court to stay its hand "while retaining jurisdiction, to allow the State Court a reasonable time within which to review the Colegio's remedy, and to accept, reject or modify it, the State Court, at the request of the Colegio, held extensive hearings (the "1985 State Court Hearings"), before a special master, a former Associate Justice of the State Court and dues paying, good-standing member of the Colegio, to hear testimony of the Colegio. These hearings were scheduled by the State

Court under the same case number as the 1977 Disbarment Action and Ramos & Schneider were duly notified of the 1985 State Court Hearings as if they were parties to the proceedings, although at all times they informed the State Court and the Special Master that they appeared and took part in the 1985 State Court Hearings not as parties nor in an adversary capacity because the adjudicative action against them in the 1977 Disbarment Action ended with the *1982 State Court Decision* and their subsequent disbarment in execution and enforcement of said *1982 State Court Decision*, but as observers in order to assist in the drafting of an acceptable remedy.

The attorney for Respondents Oreste, Romany and Souss, who were never parties in the 1977 Disbarment Action, was notified of the 1985 State Hearings and appeared at the first hearing, a preliminary hearing held before the special master in January of 1985 as part of the 1985 State Court Hearings. At this preliminary hearing Respondents Oreste, Romany and Souss announced that they were not and had never been parties to the 1977 Disbarment Action and that they had appeared as a matter of courtesy on being notified of the hearing; the Colegio announced that those who were not parties, who had no interest and who came to the hearing as a matter of courtesy should be free; Respondents Oreste, Romany and Souss then asked the special master to be relieved of further participation in the proceedings, and the special master then relieved and excused these three Respondents from further participation in the 1985 State Court Hearings. This is incorrectly characterized by the Colegio, at page 4 of their petition, and by the Secretaries, at pages 6 and 17 of their petition, as the refusal of Respondents Oreste, Romany and Souss to participate in the 1985 State Court Hearing, although the Secretaries do concede, at footnote 6 on page 6 of their petition, that, in its June 26, 1986 ruling adopting the new Colegio remedy (the "*1986 Remedy*"), reported at 117 D.P.R. 504, the State Court stated that Respondents Oreste, Romany and Souss requested to be relieved from further participation in the 1985 State Court Hearings and that this request was granted, and the Colegio, at page 16 of its petition, and the Secretaries, at page 17 of their petition, incorrectly conclude that, because of such refusal, Respondents Oreste, Romany and Souss "simply waived their rights and implicitly agreed to" the *1986 Remedy*.

REASONS FOR DENYING THE WRIT

THE ROOKER-FELDMAN AND THE RES JUDICATA ISSUES WERE CORRECTLY DECIDED BY THE DISTRICT COURT AND BY THE COURT OF APPEALS.

It is true that throughout the long history of this case the Colegio has argued many times that the holding in *Rooker* and its progeny bars the exercise of jurisdiction by District Court in the Consolidated Actions and that these cases should be dismissed on *res judicata* grounds, but this has not been its "unflagging position."

Unfortunately, the same cannot be said for the Secretaries and their assertion on page 10 of their petition that, "throughout the long history of this case it has been (their) unflagging position" is just not true. For the Secretaries it is only the second time that they have raised these issues, the first time being in their appeal of the *1988 District Court Judgment* and now in their petition before this Court.

In 1982 the Justices and the Colegio moved in the District Court for the dismissal of the Consolidated Actions for lack of jurisdiction based on the *Rooker* doctrine and on *res judicata* grounds. The District Court in the 1982 Jurisdiction Decision denied dismissal on these grounds. The Secretaries did file a motion to dismiss in 1982 "but limited to the issues raised by the *Tax Injunction Act* and the *Butler Act*," none of which issues has been raised here, which motion was also denied in the 1982 Jurisdiction Decision.

The Justices again moved for dismissal for lack of jurisdiction under *Rooker* and on *res judicata* grounds in their 1982 petition for writ of mandamus in the Court of Appeals, which was denied in the *1982 Court of Appeals Decision*. The Colegio also filed a petition for writ of mandamus with the Court of Appeals in 1982 but on the same grounds, which petition was denied in the *1982 Court of Appeals Decision*

The Secretaries did not participate in the 1982 mandamus proceedings before the Court of Appeals.

The same issues were raised again by the Colegio in the District Court at the conclusion of the 1983 trial and before judgment and were again rejected by the District Court. No such issues were raised by the Secretaries at that time.

The Colegio did not argue for dismissal on the grounds of *Rooker* and on *res judicata* grounds in their appeal from the *1983 District Court Judgment*, and in the *1984 Court of Appeals Decision* it is noted at footnote 6 on page 37 that the Colegio had not challenged the 1982 Jurisdiction Decision denying dismissal on these grounds.

The Secretaries did not take any appeal from the *1983 District Court Judgment* and in their memorandum of law after the 1983 District Court trial they expressly stated that, "[i]nsofar, then, as plaintiff's claim in [those cases] may involve a general challenge to the constitutionality of Law 43 of May 14th, 1932, 4 L.P.R.A. 771 et seq., claiming that it is an encroachment of individual rights under the First and Fourteenth Amendments to the United States Constitution; and a general challenge to the constitutionality of Law 99 of June 7th, 1956, 4 L.P.R.A. 851, claiming that they are in violation of the equal protection clause of the Fourteenth Amendment of the United States Constitution, said challenges fall under the jurisdiction of this Honorable Court."

In the 1987 proceedings before the District Court the Colegio again sought dismissal on the basis of *Rooker* and on *res judicata* grounds, which dismissal was again denied in the *1987 Jurisdiction Decision*. The Secretaries did not file any motion for dismissal on these grounds with the District Court.

In their appeals from the *1988 District Court Judgment* both the Colegio and the Secretaries again raised the issues of lack of jurisdiction under *Rooker* and of *res judicata*, both of which had been resolved by the District Court in its 1982 Jurisdiction Decision and again in its *1987 Jurisdiction Decision*. And now, the Colegio and the Secretaries again raise the same issues on their petitions for writs of certiorari.

Both the Colegio and the Secretaries attempt to avoid the major stumbling block to their jurisdiction and *res judicata* claims by incorrectly stating in their respective statements of the case (the Colegio at page at page 2 and again at the bottom of page 10; the Secretaries at page 4) that the action filed in the State Court by the Colegio was against the five Respondents herein when in fact only two of the five Respondents were parties in the State Court action. The Colegio and the Secretaries not only misstate the facts when they claim that all five Respondents were parties in the 1977 Disbarment

Action filed by the Colegio with the State Court but they also misstate the facts when they assert (the Colegio at page 4 and the Secretaries at page 6 and 15) that Respondents Oreste Ramos, Jorge Souss and Jorge Romany refused to participate in the 1985 State Court Hearings. As the Court of Appeals correctly noted in the *1990 Court of Appeals Decision* at 628-629 "a contrary conclusion on the (jurisdiction issue) would have little impact on this litigation because only two of the plaintiffs were parties in the state court; thus, even if jurisdiction were improper as to them, the case would continue on behalf of the remaining plaintiffs."

The Colegio and the Secretaries in their efforts to characterize the 1985 State Court Hearings and the *1986 Remedy* as adjudicative by asserting that Ramos & Schneider participated in the 1985 State Court Hearings in an adversary capacity, raising "objections to the Colegio's proposed findings of fact and conclusions of law" and presenting "their own counterproposal of findings of fact and conclusions of law." At the preliminary hearing held in January of 1985 in the 1985 State Court Hearings, Attorney Negron Garcia, on behalf of the Colegio stated that the hearing was to give Respondents "participation in the formulation of a remedy which, it appears to me, is all that is in issue here today. And the hearing before Your Honor is basically the presentation of the evidence that may be necessary to design a remedy. That is, the Court at this time is not adjudicating if membership is compulsory or not compulsory, or if it should or should not be, or if the 'Colegio de Abogados' is going to take part in ideological activities or not. The Supreme Court already decided. That, this has been adjudicated by the Supreme Court of Puerto Rico. What appears to me to be the issue is to design a remedy...."

Ramos & Schneider at all stages of the 1985 State Court Hearings informed the State Court and the Special Master that they did not appear as parties or in an adversary capacity because the adjudicative proceedings against them initiated with the 1977 Disbarment Action had terminated with the *1982 State Court Decision*. Ramos & Schneider submitted their comments and corrections to the proposed findings of fact and remedy submitted by the Colegio in the 1985 Hearings. They submitted no conclusions of law because the State Court had clearly stated that the function of the Special Master was to receive the evidence and submit a report of his findings of fact.

THE DECISION OF THE COURT OF APPEALS DOES NOT VIOLATE ANY OF THE PRINCIPLES OF COMITY OR OF FEDERALISM

Petitioners have presented no compelling argument to merit the issuance of the requested writs on the grounds of alleged violations of the principles of Comity and Federalism.

The Secretaries, in their petition on this point, cite the words of Justice O'Connor to the effect that there "is no reason to assume that state court judges cannot and will not provide a 'hospitable forum' in litigating federal constitutional questions." The issue of a 'hospitable forum' has never been raised in this case and yet it is interesting to note that all of the Justices of the State Court who acted in this case, were at all times, dues paying, good-standing members of the Colegio and one Justice, at the time that he issued a concurring opinion in the State Court, was the brother of one of the lawyers representing the Colegio before the State Court; that the Special Masters named by the State Court were all dues paying, good-standing members of the Colegio; that the State Court imposed the sanction of disbarment under the *1982 State Court Decision* on only two of the 17 lawyers who were in arrears in the payment of Colegio compulsory dues and were parties to the 1977 Disbarment Action, on the only two who challenged the compulsory membership and funding system, and that the two former State Court Justices who were named by the State Court to the Review Board of Colegio ideological activities and were objected to by Respondents because they had participated as Justices in the *1982 State Court Decision* subsequently resigned from the Review Board stating that they should not act on the Review Board because they had participated as Justices in the *1982 State Court Decision.*

NO OTHER ISSUES HAVE BEEN RAISED BY PETITIONERS THAT JUSTIFY THE ISSUANCE OF THE WRITS

The Petitioners have raised other issues in their petitions but none with any substance or sufficiently important to merit review by this Court. They are treated as side or secondary issues by Petitioners and should be treated in the same way by this Court.

CONCLUSION

None of the issues raised by Petitioners merit review by this court. The petitions of the Colegio and of the Secretaries for writs of certiorari should be denied.

DATED: May 20, 1991

Respectfully submitted,

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No. ~~90-1470~~

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In the Supreme Court of the United States

OCTOBER TERM, 1990

COLEGIO DE ABOGADOS DE PUERTO RICO,
PETITIONER,

v.

ROBERT E. SCHNEIDER; HECTOR RAMOS; ORESTE V. RAMOS; JORGE F. ROMANY; AND JORGE SOUSS,
RESPONDENTS, CROSS-PETITIONERS.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

OPPOSITION TO CROSS-PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Whether, as the record has been developed below, the Commonwealth of Puerto Rico can constitutionally condition the right to practice law in Puerto Rico upon compelled membership in, and the payment of compulsory dues to, the Colegio de Abogados de Puerto Rico without *per se* violating an individual attorney's First Amendment rights.

2. Whether, assuming any award of damages was warranted in favor of plaintiffs' in this case, the nominal award of $1.00 does not constitute an abuse of discretion on the part of the District Court, where plaintiffs submitted no evidence of the nature and extent of the harm they have allegedly suffered, and cited no precedent imposing on the Court the obligation to speculate on the extent of their injury.

3. Whether, plaintiffs lack taxpayer standing to challenge the Commonwealth of Puerto Rico's internal revenue offices to sell notarial and forensic stamps issued by the Colegio de Abogados de Puerto Rico, where they failed to show that such activity involves "a measurable appropriation" or loss of revenue, or "a direct dollars-and-cents injury" to themselves.

PARTIES TO THE PROCEEDINGS

Petitioners and cross-respondent, who were appellants below, are Colegio de Abogados de Puerto Rico, petitioner in Case No. 90-1470; the Secretaries of Justice and of the Treasury of the Commonwealth of Puerto Rico, petitioners in Case No. 90-1513, and the Justices of the Supreme Court of Puerto Rico, nominal parties in their rule-making capacity.

Respondents and cross-petitioners, who were appellees below, are Robert E. Schneider, Hector Ramos, Oreste V. Ramos, Jorge F. Romany, and Jorge Souss.

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In the
Supreme Court of the United States

OCTOBER TERM, 1990

No. 90-1470

COLEGIO DE ABOGADOS DE PUERTO RICO,
PETITIONER,

v.

ROBERT E. SCHNEIDER; HECTOR RAMOS;
ORESTE V. RAMOS; JORGE F. ROMANY;
AND JORGE SOUSS,
RESPONDENTS, CROSS-PETITIONERS.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

OPPOSITION TO CROSS-PETITION FOR WRIT OF CERTIORARI

Petitioner and cross-respondent Colegio de Abogados de Puerto Rico, hereby respectfully opposes a cross-petition that a writ of certiorari be issued to review the judgment and opinion of the United States Court of Appeals for the First Circuit entered on October 24, 1990 in Cases Nos. 88-1937, 88-1938, and 88-1939, reported at 917 F.2d 620.

Opinions Below

The final opinion of the United States Court of Appeals for the First Circuit was entered on October 24, 1990, is reported at 917 F.2d 620 and appears reprinted at pages 1 to 36 of the Appendix to the Petition for the Writ of Certiorari in Case No. 90-1470 filed by the Colegio de Abogados de Puerto Rico.

Jurisdiction

Invoking federal jurisdiction under 42 U.S.C. §1983, the respondents and cross-petitioners brought this suit in the United States District Court for the District of Puerto Rico. On March 3, 1988, the District Court entered its opinion and judgment, reported at 682 F. Supp. 674 (D.P.R. 1988), declaring unconstitutional provisions of Puerto Rico laws imposing mandatory membership in the Colegio de Abogados de Puerto Rico, mandatory payment of dues to the Colegio de Abogados de Puerto Rico and mandatory purchase of stamps issued by the Colegio de Abogados de Puerto Rico.

On petitioner's and cross-respondents' appeals, the First Circuit entered a judgment on October 24, 1990 that affirmed in part, reversed in part, and modified and remanded the case for further proceedings consistent with its opinion. Upon a timely petition for rehearing with the suggestion that the case be reheard *en banc*, the First Circuit denied the petition for rehearing on December 20, 1990.

This Court has jurisdiction to review the judgment or decision of the Court of Appeals for the First Circuit under 28 U.S.C. §1254(1).

This Opposition to Cross-Petition for Writ of Certiorari is authorized under the provisions of Rules 12 and 13 of the Rules of this Court.

Constitutional and Statutory Provisions Involved

Petitioner and cross-respondent Colegio de Abogados de Puerto Rico respectfully refer the Court to its statement of Constitutional and Statutory Provisions Involved contained in its Petition for Writ of Certiorari dated March 26, 1991.

Statement of the Case

Petitioner and cross-respondent Colegio de Abogados de Puerto Rico respectfully refer the Court to its Statement of the Case contained in its Petition for Writ of Certiorari dated March 26, 1991.

Reasons for Denying the Writ

I. As the Record Has Been Developed Below, the Commonwealth of Puerto Rico Can Constitutionally Condition the Right to Practice Law in Puerto Rico Upon Compelled Membership in, and the Payment of Compulsory Dues to, the Colegio de Abogados de Puerto Rico Without Per Se Violating an Individual Attorney's First Amendment Rights.

The Court below fully considered and correctly decided the issue attempted to be presented now by the cross-petitioner. This Court in *Keller* v. *State Bar of California*, 495 U.S. __, 110 L.Ed.2d 1, 110 S.Ct. 2228 (1990), reaffirmed its earlier decision in *Lathrop* v. *Donahue*, 367 U.S. 820 (1961), that compelled membership in an integrated state bar and the payment of compulsory dues as a member of such bar, does not *per se* violate an individual attorney's First Amendment rights.

In *Lathrop*, six members of this Court, relying on *Railway Employees* v. *Hanson*, 351 U.S. 225 (1956), rejected a Wisconsin lawyer's claim that he could not constitutionally be compelled to join and financially support a state bar association

that expressed opinions on, and attempted to influence, legislation:

> "In our view the case presents a claim of impingement upon freedom of association no different from that which we decided in (*Hanson*). We there held that §2, Eleventh of the Railway Labor Act... did not on its face abridge protected rights of association in authorizing union-shop agreements between interstate railroads and unions of their employees conditioning the employees' continued employment on payment of union dues, initiation fees and assessments... In rejecting Hanson's claim of abridgement of his rights of freedom of association, we said, 'on the present record, there is no more an infringement or impairment of First Amendment rights than there would be in the case of a lawyer who by state law is required to be a member of an integrated bar.' 351 U.S., at 238." *Lathrop*, 367 U.S., at 842 (plurality opinion) (footnote omitted).

In *Keller*, this Court held that the petitioners' freedom of association claim based on the State Bar of California's use of its name to advance political and ideological causes or beliefs would not be addressed by this Court in the first instance. 495 U.S. at __, 110 L.Ed.2d at 16. As in this case, the California Court had not addressed the claim. Despite the disparaging and unwarranted remark by the First Circuit panel opinion that "there is an argument to be made that 'the Colegio's penchant for ideological contention is so pervasive and unremitting... that Puerto Rico cannot constitutionally force dissenters to join," *Romany* v. *Colegio de Abogados de Puerto Rico*, 742 F.2d 32, at 40-41 (1st Cir. 1984), the very First Circuit acknowledges that the record in this case leaves that argument unresolved, leaving it unprepared to hold that a rebate and escrow system to protect dissenters is unworkable at the

Colegio. 917 F.2d at 634. In leaving that argument unresolved, the First Circuit also left open any consideration of an argument that the Colegio may be enjoined permanently from using its name to advance political or ideological causes beyond those for which mandatory financing is permissible. 917 F.2d at 634, n.19.

Respondents and cross-petitioners cite no authority to support their proposition to the contrary. Their statement that it is "clearly wrong" is not meaningful. To attempt to resolve this important issue on the basis of the record as it has been developed by the plaintiffs would disserve the development of First Amendment doctrine.

II. Assuming Any Award of Damages Was Warranted in Favor of Plaintiffs in This Case, the Nominal Award of $1.00 Does Not Constitute an Abuse of Discretion on the Part of the District Court, Where Plaintiffs Submitted No Evidence of the Nature and Extent of the Harm They Have Suffered, and Cited No Precedent Imposing on the Court the Obligation to Speculate on the Extent of Their Injury.

The decision below on the award of nominal damages in the amount of $1.00 follows an unbroken line of authority of this Court that in the absence of any proof of damages, a district court acts within its discretion in declining to award more than a nominal sum. *See Memphis Community School Dist.* v. *Stachura*, 477 U.S. 299, 308 n.11 (1986) ("(N)ominal damages, and not damages based on some undefinable 'value' of infringed rights, are the appropriate means of 'vindicating' rights whose deprivation has caused actual, provable injury.") (citing *Carey* v. *Piphus*, 435 U.S. 247 (1978)). *See also id.* at 315-316 (Marshall, J., concurring) (quoting *Hobson* v. *Wilson*, 737 F.2d 1, 62 (D.C. Cir. 1984)) (injury to a First Amendment-protected interest may be compensated with

substantial damages, but "only to the extent that it was 'reasonably quantifiable'").

There was no evidence to allow the District Court to award damages in any amount higher that $1.00 through any method other than speculation, which would constitute a clear abuse of discretion. There was no proof of any damages that may allow this Court to reverse the First Circuit's judgment on that issue.

III. Plaintiffs Lack Taxpayer Standing to Challenge the Commonwealth of Puerto Rico's Internal Revenue Offices to Sell Notarial and Forensic Stamps Issued by the Colegio de Abogados de Puerto Rico, Where They Failed to Show That Such Activity Involves "A Measurable Appropriation" or Loss of Revenue, or "A Direct Dollars-and-Cents Injury" to Themselves.

A party who invokes federal judicial power to challenge the constitutionality of a statute of the Commonwealth of Puerto Rico must be able to show not only that the statute is invalid but that he has sustained or is immediately in danger of sustaining some direct injury as a result of its enforcement, and not merely what he suffers in some indefinite way in common with people generally.

In *Doremus* v. *Board of Education*, 324 U.S. 429 (1952), a taxpayer was held to have no standing to attack the constitutionality of a state statute providing for the reading of Bible verses at the opening of each public-school day, where there was no allegation that such activity was supported by any separate tax or paid for from any particular appropriation or that it added any sum whatever to the cost of conducting the school or increased any tax paid by him. This Court's subsequent decision in *Valley Forge Christian College* v. *Americans United for Separation of Church and State*, 454 U.S. 464 (1982), held that the plaintiffs lacked standing, within the

meaning of Article III, as either taxpayers or citizens to bring suit to challenge the conveyance of a former military hospital to a church-related college after the facility had been declared surplus real property by the Department of Health, Education and Welfare, and then permitted the college to acquire the property without making any financial payment. The Court concluded that the plaintiffs lacked standing, in effect holding that the alleged deprivation of the constitutional use of their tax dollars failed to state a cognizable personal injury different from the harm purportedly sustained by taxpayers generally.

In this case, plaintiffs have made no showing that the activities of the Colegio de Abogados de Puerto Rico that they are challenging involve any measurable appropriation or loss of revenue, or any direct injury to themselves. Therefore, the plaintiffs may not challenge the use of government facilities to sell the Colegio stamps.

Conclusion

As the record has been developed below, compelled membership in the Colegio de Abogados de Puerto Rico does not involve any implication of First Amendment rights of the respondents and cross-petitioners. The courts below did not abuse their discretion in awarding the amount of $1.00 for the damages allegedly suffered by the plaintiffs. Plaintiffs have no standing to challenge the use of government facilities to sell the notarial and forensic stamps issued by the Colegio de Abogados de Puerto Rico.

Respectfully submitted,

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May 22, 1991